91-353

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN THE INTEREST OF A.E.H., a Person Under the Age of 18:
C.C.,

Petitioner,

v.

P.C. and J.H.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Pursuant to 28 USC § 1738A, and considering that the court of last resort in California has held that only California courts have jurisdiction to determine the issue of custody of A.E.H. and the court of last resort in Wisconsin has held that only Wisconsin courts have jurisdiction to determine the issue of custody of A.E.H., should Wisconsin courts give Full Faith and Credit to the custody determination of the courts of the State of California?

LIST OF PARTIES

Carl B. Crouse, Petitioner.

Philip A. Creanza, Respondent.

Joanne Habelt, Respondent.

Ashley Elizabeth Habelt, minor child

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PETITION FOR A WRIT OF CERTIORARI

C.C., father of the minor child A.E.H., petitions for a Writ of Certiorari to review the decision of the Supreme Court of the State of Wisconsin entered in this case on April 17, 1991.

RELATED OPINIONS

Crouse v. Creanza, 658 F.Supp. 1522 (W.D. Wis. 1987).

In the Interest of A.E.H., 152 Wis. 2d 182, 448 N.W.2d 662 (Ct. App. 1989).

In the Interest of A.E.H., 161 Wis. 2d 277, 468 N.W.2d 190 (1991).

JURISDICTION

This Petition for a Writ of Certiorari seeks review of an opinion issued by the Wisconsin Supreme Court on April 17, 1991. Pursuant to § 809.64, Wis. Stats., C.C.[1] sought reconsideration of that decision of the Wisconsin Supreme Court. On June 4, 1991, the Wisconsin Supreme Court denied the Motion for Reconsideration. The Supreme Court of the State of Wisconsin is the court of last resort in Wisconsin. Ch. 751, § 809.62, Wis. Stats.

Since this Petition involves a question of Full Faith and Credit between the courts of two states under 28 U.S.C. § 1738A, this Court will review the decisions of the appellate courts of the State of California which concern jurisdiction to determine the custody of A.E.H. The Court of Appeals of California issued decisions concerning jurisdiction over, and custody of, A.E.H. on September 6, 1988 and September 14, 1989. Pursuant to Rule 28, California Appellate Rules, P.C. and J.H. petitioned the California Supreme Court to review those decisions. That petition was denied by the California Supreme Court on December 6, 1989. The Supreme Court of the State of California is usually the court of last resort in California. Article VI, § 12, California Constitution. However, when the California Supreme Court denies a petition to review a decision of the California Court of Appeals, the California Court of Appeals is considered the court of last resort for purposes of a Petition for a Writ of Certiorari in this Court. *Cohen v. California*, 403 U.S. 16, 18 (1971).

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[1] Consistent with this Court's Rule 14.1(b), this Petition contains, at page i only, the full names of the parties to this action. However, pursuant to §§ 48.78 and 809.19(1)(g), Wis. Stats., and consistent with the practice of the Wisconsin appellate courts in these actions, the remainder of the Petition and Appendix refers to all persons by their initials only. This is consistent with this Court's practice in similar cases. See, *Mississippi Band of Choctaw Indians v. Holyfield, J.B., W.J.*, 490 U.S. 30 (1989).

Therefore, jurisdiction to review this action is conferred on this Court pursuant to 28 U.S.C. § 1257.

FEDERAL STATUTE INVOLVED

The section of the United States Code which governs this case is 28 U.S.C. § 1738A. It states:

> *Full faith and credit given to child custody determinations.*
>
> (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.
>
> (b) As used in this section, the term—
>
> (1) "child" means a person under the age of eighteen;
>
> (2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;
>
> (3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;
>
> (4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any such persons are counted as part of the six-month or other period;
>
> (5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior

custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is

necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c) (1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that

other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

STATEMENT OF THE CASE

28 U.S.C. § 1738A was enacted in 1980 to ensure that courts of different states would not assert jurisdiction over the same child at the same time in a child custody dispute. With its decision of April 1991, the Wisconsin Supreme Court has caused the courts of last resort in two states to continue to assert jurisdiction, after reviewing the same facts and the same law, over the same child at the same time. The decisions of the courts of last resort in Wisconsin and California are final and no further review is available in those states. The minor child recently turned eight years old and the deadlock will not resolve itself unless this Court acts to determine the issue of jurisdiction over A.E.H. between California and Wisconsin.

A.E.H. was born to C.C. and H.H. in California on August 2, 1983. (App., pp. 47a-48a). A.E.H. resided with her mother in California from her birth until May 1984. From May 1984 to May 1985, A.E.H. resided with her grandfather in Missouri. A.E.H. resided in California from May 1985 to February 25, 1986. Prior to February 25, 1986, A.E.H. never resided in Wisconsin. C.C. has resided in California since before A.E.H.'s birth to the present. (App., pp. 5a, 43a, and 91a).

On February 23, 1986, H.H. died and A.E.H. was put into temporary placement by the California juvenile authorities. (App., p. 38a). On or about February 25, 1986, H.H.'s relatives arrived in California. The California juvenile authorities believed, through false and/or fraudulent representations of the maternal relatives, that the father of A.E.H. was unknown. (App., pp. 38a-39a, 91a). C.C. is noted on A.E.H.'s birth certificate as her father. (App., p. 91a). Prior to H.H.'s death, C.C.

offered to assist in the support of A.E.H. C.C. offered to marry H.H. but the offer was not accepted. (App., p. 49a). C.C. had spent significant amounts of time with his daughter and she knew him as her father. (App., p. 49a). A.E.H. was released into the custody of one of H.H.'s relatives on or about February 26, 1986. That relative is A.E.H.'s uncle (not P.C.) who is not a party to any of these proceedings. C.C. could not confirm that his daughter was removed from the State of California until approximately three weeks later. (App., pp. 5a, 49a).

The minor child was released to H.H.'s relatives, under the circumstances described above, by a California court referee. Under California law, referees may be appointed by trial courts to perform subordinate judicial duties. Article VI, § 22, California Constitution. The determinations of a referee are reviewable by a juvenile court judge. California Welfare and Institution Code, § 250. All orders of a referee may be vacated or modified by a juvenile court judge. California Rules of Court, § 1417 (a). A juvenile court judge may grant or deny an application for rehearing. California Welfare and Institution Code, § 252, California Rules of Court, § 1418(c). In this case, the question of whether the state of California declined jurisdiction over A.E.H. arose. In a motion heard by the juvenile court judge, the Honorable Leonard P. Edwards, it was determined that, on February 25-February 26, 1986, California did not decline jurisdiction to Wisconsin. (App., pp. 44a, 58a).

At the end of February 1986, A.E.H. was brought to Wisconsin. A.E.H. has been in Wisconsin since that time. (App. p. 6a). On March 14, 1986, the aunt and uncle of the minor child, P.C. and J.H., received information that someone who said he was A.E.H.'s father was looking for her in California. (App., p. 6a). Three days later, P.C. and J.H. began a guardianship proceeding in the Rock County Circuit Court for the State of Wisconsin. (App., p. 6a). C.C. was not personally served the Petition for

Guardianship until it was received by mail on June 20, 1986. (App., p. 7a). On April 1, 1986, and after C.C. determined the events which led to his daughter's removal from California, he commenced an action in the California Superior Court for custody of A.E.H. (App., p. 39a).

C.C. then appeared in the Wisconsin guardianship action and objected to the jurisdiction of the Wisconsin courts. On June 17, 1986, a hearing was held by telephone conference call with the attorneys in both states, Judge Frank O. Tetley, a court commissioner serving as judge pro tempore [2], and a Wisconsin circuit court judge. (App., pp. 61a, 90a). During that hearing, Judge Tetley of California found that: (a) the California juvenile court had released A.E.H. to maternal relatives under false and/or fraudulent representations of the maternal relatives; (b) only the state of California has jurisdiction over A.E.H. pursuant to California law, the Uniform Child Custody Jurisdiction Act (UCCJA), and 28 U.S.C. § 1738A; (c) the decision of the California juvenile court did not decline jurisdiction over A.E.H. to Wisconsin; (d) pursuant to 28 U.S.C. § 1738A(g), Wisconsin should not assume jurisdiction over A.E.H.; and (e) temporary custody of A.E.H. shall be awarded to C.C. (App., pp. 61a-65a, 90a-93a). In the same conference call, Judge Lussow of Wisconsin ruled that Wisconsin had jurisdiction over A.E.H. (App., p. 63a). On June 26, 1986, and with C.C. objecting to the jurisdiction of the Wisconsin courts and objecting to further proceedings in Wisconsin, the Wisconsin Circuit Court appointed P.C. and J.H. as guardians of A.E.H. (App., p. 9a). That order is still in effect.

On November 26, 1986, P.C. and J.H. petitioned the Rock County, Wisconsin Circuit Court for a termination of C.C.'s parental rights. (App., p. 9a). C.C. continued to object to the jurisdiction of the Wisconsin courts but

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[2] In California, court commissioners have powers distinct from those of a referee. *California Code of Civil Procedure*, § 259.

the matter went to trial. On May 16, 1987, and after a three-day jury trial, a Wisconsin jury confirmed that C.C. is the father of A.E.H. The jury also found that there were no grounds to terminate his parental rights. (App. pp. 9a, 80a).

In the meantime, an action was started by C.C. in the United States District Court for the Western District of Wisconsin since, at that time, a majority or the United States Courts of Appeal which reviewed the issue had held that 28 U.S.C. § 1738A gave rise to a cause of action in federal district courts to resolve child custody jurisdictional deadlocks such as this.[3] In a decision reported at 658 F. Supp. 1522, Judge Shabaz dismissed C.C.'s complaint as he found there was no federal court jurisdiction over the matter. While that decision was on appeal to the United States Court of Appeals for the Seventh Circuit, *Thompson v. Thompson*, 484 U.S. 174 (1988) settled the issue of federal district court jurisdiction in these cases and the appeal to the United States Court of Appeals for the Seventh Circuit was dismissed.

Shortly after the Wisconsin jury trial which ended in May 1987, the Wisconsin court turned to the issue of custody of A.E.H. as is required under § 48.422(6)(c), Wis. Stats. The standard for a custody determination in a parent versus non-parent situation is set forth in *Barstad v. Frazier*, 118 Wis. 2d 549 (1984). (App., p. 11a).

In October 1987, a trial was held in the Superior Court for the State of California before the Honorable Dennis G. Cole. (App., p. 55a). P.C. and J.H. made a general appearance and presented evidence at that trial. (App., pp. 49a, 55a). The California state law standard is quite similar to Wisconsin law on custody disputes between

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[3] See *McDougald v. Jenson*, 786 F.2d 1465, 1480 (11th Cir. 1986); *Flood v. Braaten*, 727 F.2d 303, 307 (3rd Cir. 1984); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Hickey v. Baxter*, 800 F.2d 430 (4th Cir. 1986).

parents and non-parents. (App., pp. 51a, 55a-57a, 62a). Based on the findings of Judge Cole in view of the applicable law, it was ordered that C.C. be awarded sole custody of A.E.H. with rights of the maternal relatives to see the child. (App., pp. 56a-57a).

P.C. and J.H. appealed the question of the California court's jurisdiction over A.E.H. to the California Court of Appeals. (App., p. 38a). The California Court of Appeals issued an opinion on September 6, 1988 concerning jurisdiction over A.E.H. under the UCCJA (California Code § 5150, et. seq.) and 28 U.S.C. § 1738A (App., pp. 12a, 38a-46a). Specifically, the California Court of Appeals held that California, and not Wisconsin, is A.E.H.'s "home state" as that phrase is defined in the applicable statutes. (App., pp. 41a-42a). That court also held that California, and not Wisconsin, had more significant contacts with A.E.H. It was further found that no California court ever declined jurisdiction over A.E.H. to any Wisconsin court. (App. pp. 42a-44a).

P.C. and J.H. then appealed to the California Court of Appeals the question of whether C.C. should have been granted sole custody of A.E.H. by the California Superior Court. (App., p. 47a). The order of Judge Cole granting sole custody of A.E.H. to C.C. was affirmed by the California Court of Appeals on September 14, 1989. (App., pp. 47a-53a).

The California Supreme Court was then petitioned by P.C. and J.H. to review the issues of jurisdiction over, and custody of, A.E.H. That petition was denied by the California Supreme Court on December 6, 1989. (App., p. 54a). Pursuant to Rule 28, California Appellate Rules, the orders of the California Supreme Court as to jurisdiction over, and custody, of A.E.H. are now final. No further review is available in California on those issues.

During the summer of 1988, the Rock County, Wisconsin Circuit Court again reviewed the issue of jurisdiction over A.E.H. (App., pp. 66a-76a). Under Wisconsin law,

the issue of subject matter jurisdiction may be reviewed at any time, even on the court's own motion. *Sheehan v. Industrial Commission*, 272 Wis. 595, 601 (1956); *In the Interest of H.N.T.*, 125 Wis. 2d 242, 245 (Ct. App. 1984). The review of jurisdiction was based on, among other things, 28 U.S.C. § 1738A. (App., pp. 66a-76a). After further review of the matter, the Wisconsin action was dismissed by the Wisconsin Circuit Court judge on October 4, 1988 as the Wisconsin court found that only California, and not Wisconsin, had jurisdiction over A.E.H. However, further action was stayed pending an appeal of that order.[4] (App., pp. 12a, 81a).

On August 1, 1989, the Wisconsin Court of Appeals affirmed the Wisconsin trial court. (App., pp. 77a-89a). It was found that only California courts, and not Wisconsin courts, could properly exercise jurisdiction over the question of custody of A.E.H. The Wisconsin Court of Appeals stated:

> Here, the subject matter of the guardianship and TPR proceedings were so plainly beyond the Wisconsin court's jurisdiction that its entertaining the actions was a manifest abuse of authority. Additionally, to allow the previous rulings on jurisdiction to stand under the doctrine of collateral estoppel would substantially infringe on the proper tribunal, the California court. Also, for the reasons previously discussed, the trial court correctly concluded that proper jurisdiction on the custody issue lies in California.
>
> *In the interest of A.E.H.*, 152 Wis. 2d 182, 199 (Ct. App. 1989) (App., p. 89a).

P.C. and J.H. then petitioned the Wisconsin Supreme Court to review this matter. The petition was granted on October 4, 1989. The Wisconsin Supreme Court then

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[4] A separate action in the Rock County, Wisconsin Circuit Court to enforce the California Superior Court Order, initiated pursuant to § 822.15, Wis. Stats., was also stayed pending an appeal to the Wisconsin Court of Appeals.

reversed the order of the Wisconsin Court of Appeals and took a position contrary to the court of last resort in California. In a decision dated April 17, 1991, the Wisconsin Supreme Court found that, based on Ch. 822, Wis. Stats. (UCCJA) and 28 U.S.C. § 1738A, only Wisconsin courts may assert jurisdiction over the issue of custody of A.E.H. (App., pp. 14a, 37a).

More specifically, the Wisconsin Supreme Court found that, when Wisconsin courts first attempted to assert jurisdiction over A.E.H. in March 1986, Wisconsin was not the "home state". Rather, California was the "home state" under the applicable statutes. (App., p. 19a). The Wisconsin Supreme Court went on to state that California declined jurisdiction to Wisconsin in February 1986 when A.E.H. was released to A.E.H.'s uncle who is not a party to this action. (App., p. 22a). This finding was made in spite of the facts that: every California trial and appellate court which has heard this matter found that California courts never declined jurisdiction to Wisconsin; the Wisconsin Court of Appeals found that California courts never declined jurisdiction to Wisconsin; and California courts have continued to assert jurisdiction over A.E.H. (App., pp. 44a, 55a, 58a, 89a, 90a). The Wisconsin Supreme Court further found that, as of March 1986 (3 weeks after she left California), Wisconsin had more significant contacts with A.E.H. than did California. (App., pp. 18a-20a). That court also found that, while A.E.H. was in Wisconsin, California "lost" jurisdiction over her under the applicable law. (App., pp. 34a-36a).

The Wisconsin Supreme Court remanded the matter to the Rock County, Wisconsin Circuit Court. (App., p. 37a). C.C. sought, pursuant to § 809.64, Wis. Stats., reconsideration of that decision. The Motion for Reconsideration was denied by the Wisconsin Supreme Court on June 4, 1991. (App., p. 60a). On August 27, 1991, the Rock County, Wisconsin Circuit Court granted a stay of further proceedings in Wisconsin pending review of the issue of jurisdiction in the United States Supreme Court.

The issue of jurisdiction over A.E.H. is now final in the Wisconsin courts and no further review of that issue is available in the Wisconsin state courts. Ch. 751, Wis. Stats. As to the California courts, P.C. and J.H. have not brought any motions in the Superior Court of California based on the Wisconsin Supreme Court decision of April 1991. The order of Judge Cole from California granting sole custody of A.E.H. to C.C. is still valid and enforceable.

ARGUMENT

I. THE EXERCISE OF JURISDICTION BY BOTH CALIFORNIA AND WISCONSIN COURTS CONTRAVENES THE PURPOSE OF 28 U.S.C. § 1738A.

Article IV, § 1 of the United States Constitution requires each state to give Full Faith and Credit to the judicial proceedings of every other state. That portion of the Constitution is codified at 28 U.S.C. § 1738. As of 1980, child custody orders were sometimes found to not come within the provisions of the Full Faith and Credit statute. Many courts found that, since such decrees could be modified to protect the interests of the children, the custody orders were not ". . . sufficiently 'final' to trigger Full Faith and Credit requirements . . . ." *Thompson*, 484 U.S. at 180 [citations omitted]. In view of that situation, parties to child custody disputes had incentive to transport a child to another state, and keep the child in the other state, to seek a custody determination from a different court. *Thompson*, 484 U.S. at 180.

In 1980, Congress passed 28 U.S.C. § 1738A as an addendum to the Full Faith and Credit statute. *Thompson*, 484 U.S. at 183. That statute was designed as a mandate for state courts to respect the custody decrees of sister states. *Thompson*, 484 U.S. at 183. In the Congressional Findings and Declaration of Purpose for that Act, Congress stated that it was necessary to ". . . establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide

such disputes and the effect to be given by each jurisdiction to such decisions by the courts of other such jurisdictions." *Congressional Findings and Declaration of Purpose for 28 U.S.C. § 1738A.* The rationale for the new statute was to promote cooperation between states in these types of disputes and to "discourage continuing interstate controversies over child custody . . ." *Congressional Findings and Declaration of Purpose for 28 U.S.C. § 1738A.*

The language of 28 U.S.C. § 1738A is directed to states and state courts. *Thompson*, 484 U.S. at 183. State courts must enforce the provisions of the statute pursuant to the Supremacy Clause. United States Constitution, Article VI. Only one state court which has jurisdiction under its own laws and under the terms of the statute may properly assert jurisdiction over a custody dispute. *Thompson*, 484 U.S. at 176-177, *Flood v. Braaten*, 727 F.2d at 310. So, at any time, only one state may properly assert jurisdiction over a child under this law. The terms of 28 U.S.C. § 1738A make "home State" jurisdiction paramount. 28 U.S.C. § 1738A(c)(2). See, as examples, *Barndt v. Barndt*, 580 A.2d 320, 326 (Pa. Super. 1990); *Michael P. v. Diana G.*, 553 N.Y.S. 2d 689, 692 (A.D. 1 Dept. 1990); *Biscoe v. Biscoe*, 443 N.W. 2d 221, 225 (Ct. App. Minn. 1989); *In the Matter of B.B.R.*, 556 A.2d 1032, 1037 (D.C. App. 1989). "Home State" is defined as:

> 'home State' means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.
>
> 28 U.S.C. § 1738A(b)(4).

Therefore, the home State of the child is the State which usually assumes and retains jurisdiction under this federal law.

In spite of Congress' intent in enacting this addendum to the Full Faith and Credit statute, and in spite of the review of this federal law by the courts of California and Wisconsin, the state courts of California and Wisconsin have still come to a jurisdictional deadlock over A.E.H. The deadlock is ongoing and will not resolve itself unless this Court reviews these custody decrees to determine which State has jurisdiction over this child.

Review of Federal Statute By State Courts.

One intent of 28 U.S.C. § 1738A is to bind state courts, through the Supremacy Clause, with federal law on this issue. In this case, the federal law has been an integral part of these numerous proceedings concerning A.E.H.

In the order of the Superior Court of California concerning the February 1986 juvenile court petition, Judge Edwards specifically refers to the federal statute and the language of the order mirrors this statute. (App. pp. 58a-59a). In the order of June 1986 from the California Superior Court, the court expressly assumed jurisdiction over A.E.H. pursuant to 28 U.S.C. § 1738A and then stated that, pursuant to 28 U.S.C. § 1738A(g), the Wisconsin courts should not attempt to assume jurisdiction over A.E.H. Those orders were made during the telephone conference call with the Wisconsin Circuit Court judge. (App., pp. 90a-93a). On appeal, the California Court of Appeals also cited the federal statute and found that only California has jurisdiction under that law. (App., pp. 12a, 45a-46a).

In Wisconsin, the issue of federal law was raised in the guardianship and later proceedings. (App., pp. 68a-74a). Also, in dismissing the Wisconsin action in October 1988, the Wisconsin trial judge specifically adopted the California Court of Appeal's decision which reviewed 28 U.S.C. § 1738A. (App., pp. 12a, 45a). In its decision of April 1991, the Wisconsin Supreme Court reviewed the federal statute and found that Wisconsin, not California, had (and has) jurisdiction over A.E.H. (App.,

pp. 36a-37a). Indeed, and while it is not reviewed here, a federal district court action and a federal Circuit Court of Appeals action concerning A.E.H. was litigated solely pursuant to 28 U.S.C. § 1738A. (App., pp. 9a-11a).

Finally, the holdings of various courts regarding state law are also part of the federal statute analysis. 28 U.S.C. § 1738A(c)(1) states that a court cannot assert jurisdiction under federal law unless that court has jurisdiction under its own state's laws. So, even the analysis of the California and Wisconsin courts on state law directly affects the review of this federal law.

The provisions of 28 U.S.C. § 1738A have been reviewed by the courts of California and Wisconsin. However, the purposes of that federal statute have been frustrated since only one State may properly exercise jurisdiction—but yet both states continue to do so. Therefore, only by issuing the Writ of Certiorari and reviewing this case can this Court resolve the situation and promote the purpose of this federal statute.

II. THE DISPUTE BETWEEN CALIFORNIA AND WISCONSIN COURTS ADVERSELY AFFECTS THE INTERESTS OF THESE PARTIES AND THE PUBLIC.

28 U.S.C. § 1257 codifies the authority of this Court to review cases from courts of last resort in the various states. United States Supreme Court Rule 10.1(b) characterizes factors reviewed by this Court in these situations. The Court will review cases in which a state court of last resort has decided a federal question in a way that conflicts with the decision of another State's court of last resort.

In this case, the factors mentioned in that rule are met. The Courts of last resort in California and Wisconsin have reviewed 28 U.S.C. § 1738A and come to irreconcilable decisions. Pursuant to the Superior Court of California order signed on January 4, 1988, C.C. has sole

custody of A.E.H. That order is final regarding jurisdiction and the merits of the dispute since it has been affirmed on appeal and review in the California Supreme Court was denied. In Wisconsin, P.C. and J.H. have custody of A.E.H. pursuant to an order of the Rock County, Wisconsin Circuit Court from June 1986. On appeal, the Wisconsin Supreme Court found that Wisconsin Courts have jurisdiction to make that custody determination and refused to overrule that custody decree.[5] The issue in Wisconsin is final. All persons which claim to have a right to custody of A.E.H. have valid, enforceable, and directly conflicting orders from different States. The deadlock between California and Wisconsin courts has continued for five and one-half years and may continue for ten more years; that is, until A.E.H. is no longer a minor.

The statute enacted by Congress applies to state courts, and not federal courts, since it is presumed that state courts will faithfully administer the Full Faith and Credit clause in child custody disputes. *Thompson*, 484 U.S. at 187. However, as this Court foresaw in the *Thompson* case, it was conceivable (and probably inevitable) that the courts of last resort in two States would someday cause a ". . . truly intractable jurisdictional deadlock[s]." *Thompson*, 484 U.S. at 187. As was stated by Justice Marshall in the opinion of the Court in that case, review of such an "intractable" deadlock is available in this Court. *Thompson*, 484 U.S. at 187. Here, the interests of the public, the adults involved, and this child will be protected if the Court reviews and determines this unfortunate situation foreseen in *Thompson*.

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[5] The Wisconsin Court of Appeals and the Wisconsin Supreme Court found that the guardianship proceeding was a "custody determination" under the UCCJA and, presumably, federal law. 28 U.S.C. § 1738A(b)(3), *In the Interest of A.E.H.*, 152 Wis. 2d at 194-195, *In the Interest of A.E.H.*, 161 Wis. 2d at 300-301 (App., pp. 17a-18a, 85a).

Interests of the Parties.

A number of problems will arise in the future if both California and Wisconsin courts continue to assert jurisdiction over A.E.H. As always, the myriad possibilities are difficult to predict. However, the two most obvious, and inevitable, consequences concern violations of criminal laws and difficulty in spending time with the child out of the State of Wisconsin.

In Wisconsin, interference with custody rights of another party is a felony punishable by, among other things, imprisonment of up to two years and a fine not exceeding $10,000. §§ 939.50(3), 948.31, Wis. Stats. In California, interference with the custody rights of another party is a felony. California Penal Code, § 278. Here, if the current situation continues, C.C. cannot have custody of his own daughter unless he risks prosecution for a felony in Wisconsin. Also, P.C. and J.H. are in violation of a valid and enforceable California court order. If such charges are brought by either State, extradiction proceedings will begin and yet another Full Faith and Credit problem will occur.

This Court is aware of such problems from *California v. Superior Court of California (Smolin)*, 484 U.S. 400 (1987). In *Smolin*, conflicting child custody decrees from different States led to a request by Louisiana authorities to extradite Smolin from California on Louisiana kidnapping charges even though Smolin's actions were appropriate in view of the California order regarding custody. *Smolin*, 482 U.S. at 402-405. In addition to the years of litigation and expense in the *Smolin* family law matters, the parties then became embroiled in years of criminal actions based on the conflicting child custody decrees. It is not in the interest of any party to this action for there to be criminal charges arising from this deadlock. However, unless this Court reviews this matter to resolve the deadlock, criminal charges and further disputes are a distinct, and virtually inevitable, possibility.

The next, and most immediate, problem the parties will face if the Petition is not granted concerns visitation with the child. Under Wisconsin law, C.C. has the right to have visitation with A.E.H. even if he never receives custody of her. § 767.24(4), Wis. Stats. Undoubtedly, the Wisconsin court will not allow C.C. to take A.E.H. to his home in California for any reason, including Christmas or summer vacation. In fact, since the Wisconsin courts know that the Wisconsin custody determination is no more valid outside Wisconsin than the California order, the Wisconsin court will not allow C.C. to leave Wisconsin with her. This is true because the Wisconsin courts know that the California authorities will not return A.E.H. to Wisconsin once she arrives in California.

The problems this causes are immense. The adults involved have to be concerned about which State A.E.H. is in and whether the adult she is with will take her to another State. This has the potential for even more litigation and, as was mentioned above, criminal charges. As for the little girl who everyone is concerned about, she will never be able to see her father unless someone is constantly monitoring to make sure C.C. does not leave Wisconsin with her. If this situation continues, A.E.H. will never be able to see her father's home and spend time with him there. C.C. will be able to see his daughter in only the most confined circumstances and under constant surveillance by suspicious adults. Such a situation will undoubtedly adversely affect the relationship between this child and her father.

One of the most fundamental rights a United States citizen has is the right to conceive and raise one's own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Here, if this impasse continues, C.C. will not only be kept from raising A.E.H., he will not be allowed to see her except in the most confined and obtrusive circumstances. That result is directly attributable to the jurisdictional deadlock mentioned in this Petition. To promote the interests

of this child, as well as the adults involved, the impasse between the courts of California and Wisconsin should be resolved.

Interests of the Public.

In addition to the immediate concerns of the parties to these actions, the public has important interests in resolving this deadlock. The purpose of 28 U.S.C. § 1738A is to ensure that the situation before this Court would not occur. In its Findings and Declaration of Purpose, Congress noted that this statute was supposed to resolve these cases since they often lead to kidnapping of children, disregard of court orders, expensive litigation, and the deprivation of rights without due process. *Congressional Findings and Declaration of Purpose for 28 U.S.C. § 1738A.* Those "evils" should be resolved by this statute. However, there have been three reported cases concerning this child and much publicity concerning the jurisdictional dispute. Yet, with the same set of facts and same law, the courts of last resort of two States have made diametrically opposed orders.

To allow this situation to continue would reinforce the public's perception that these cases cannot be resolved through the courts and the only effective alternative is self-help. As an example, the California Court of Appeal's opinion found, pursuant to the UCCJA and 28 U.S.C. § 1738(c)(2)(B), that California, not Wisconsin, had more significant contacts with A.E.H. since A.E.H. spent most of her life in California. (App., p. 42a). The Wisconsin Supreme Court found that, pursuant to state and federal law and although the child was in Wisconsin only three weeks, Wisconsin had more significant contacts with A.E.H. than did California as of March 1986. (App., pp. 18a-20a). The Wisconsin Supreme Court also found that, while California continues to assert jurisdiction over A.E.H., California lost jurisdiction over A.E.H. while matters were pending in California and Wisconsin. (App.,

pp. 34a-36a). The reasons to reverse the Wisconsin Supreme Court on these points are mentioned briefly below. However, even ignoring for the moment which State court is correct, the publication of opinions which are so drastically different but concern the same child can only encourage the removal of children from one state to another and can only encourage delays in these matters while parties try to create jurisdiction by holding the child in a State for several years. Those are problems Congress sought to remedy by enacting 28 U.S.C. § 1738A. An opinion from this Court resolving these issues will further promote the policy set forth by Congress. Therefore, based on important interests of the parties and the public, this Court should grant the Petition for a Writ of Certiorari.

III. ONLY THE COURTS OF CALIFORNIA MAY ASSERT JURISDICTION OVER THE ISSUE OF CUSTODY OF A.E.H.

The issue of custody of A.E.H. has been litigated or reviewed in two California trial courts, the California Court of Appeals (twice), the California Supreme Court, three Wisconsin trial court actions, the Wisconsin Court of Appeals, the Wisconsin Supreme Court, a United States District Court, and a United States Circuit Court of Appeal. The issues have been numerous but have now been reduced to a few key questions. A brief review of some of those issues is given below.

Home State Jurisdiction.

Under 28 U.S.C. § 1738A, "home State" jurisdiction is paramount. Unlike the UCCJA, the "home State" is virtually always found to be the state with jurisdiction under federal law.[6] In this case, even the Wisconsin Supreme

[6] 28 U.S.C. § 1738A(c)(2) and cases cited at p. 9, above. The definitions of "home State" under the UCCJA and 28 U.S.C. § 1738A(b)(4) are virtually identical.

Court concedes that California, not Wisconsin, was A.E.H.'s home State as of the time of the juvenile proceeding, at the time of the commencement of the Wisconsin action in March 1986, and at the time of the commencement of the custody proceeding in California on April 1, 1986. The Wisconsin Supreme Court took the position, under the federal statute, that California declined jurisdiction to Wisconsin in February 1986 at the juvenile proceeding. This point is important since, if California did not decline jurisdiction to Wisconsin in February 1986, then 28 U.S.C. § 1738A confers jurisdiction on California. California did not decline jurisdiction to Wisconsin at any time for a number of reasons.

First, as was shown above, referee orders in California courts are always subject to review by the juvenile court judge. Judge Edwards, the juvenile court judge, reviewed this situation in 1986 and issued an order that California did not decline jurisdiction over A.E.H. to Wisconsin. (App., p. 55a). It is reasonable to assume that the judge in charge of the court knows when jurisdiction is declined by his own court.

Second, every California court to review this matter has found that California did not decline jurisdiction to Wisconsin. Indeed, each California court has then gone on to make affirmative orders regarding the custody of A.E.H. No clearer indication of the intent of the California courts could be made. If the courts of the State of California asked Wisconsin to take over this case, those same courts would have not continued to hear evidence, hold hearings, and award custody of A.E.H. to her father.

Next, all parties to this action concede that C.C. had no notice or opportunity to be heard at the February 26, 1986 juvenile proceeding in California. The California court found that the California court referee was given incorrect information or deliberately mislead when she

was told by maternal relatives that the father of A.E.H. was unknown. (App., p. 91a). However, even if one agrees with the Wisconsin Supreme Court that California attempted to decline jurisdiction to Wisconsin in February 1986, it still cannot be said that C.C. received notice that a declination of jurisdiction to Wisconsin by California might occur. In any proceeding concerning a juvenile, a fundamental requirement is that a parent be given notice and an opportunity to be heard. See *Antonio F.*, 78 Cal. App. 3rd 440 (1978); *Kelvin M.*, 77 Cal. App. 3rd 396 (Cal. App. 1978); *In Re C.P.*, 165 Cal. App. 3rd 270 (Cal. App. 1985). Since the Wisconsin Supreme Court has put to the fore the question of whether California declined jurisdiction to Wisconsin, it would be a violation of due process to decide this case on the actions of a referee who was given incorrect information and who did not have benefit of input from the father of the child, a California citizen. To decide this entire matter on that point would be to warp the provisions of applicable state and federal law and deprive C.C. of his due process rights.

Finally, the Wisconsin Supreme Court ignored the provisions of California law which govern any attempt to decline jurisdiction to another state. Section 5156, California Code, governs determinations of inconvenient forum in child custody disputes in California. Subsection 8 of that statute states:

> Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

Communication with the forum found to be more appropriate is not optional, it is mandatory. Failure to comply with this statute is reversible error. *In Re Guardianship of Donaldson*, 223 Cal. Rptr. 707, 714 (Cal. App. 5th Dist.

1986); *Souza vs. Superior Court*, 238 Cal. Rptr. 892, 896 (Cal. App. 6th Dist. 1987); *In Re Aisha B.*, 254 Cal. Rptr. 116, 118 (Cal. App. 2nd Dist. 1988). See, also, § 5155(3), California Code.

The communication is to confirm that the appropriate state has jurisdiction. Even if it is assumed that California attempted to decline jurisdiction to Wisconsin, the California court did not comply with its own law in that regard. The more appropriate finding is that, in view of the California law, no declination of jurisdiction was intended or occurred. So, since jurisdiction was not declined to Wisconsin by California, 28 U.S.C. § 1738A (c)(2)(A) requires the finding that California was the home State of A.E.H. at the beginning of these proceedings, and only California has jurisdiction over A.E.H. pursuant to federal law.

Loss of Jurisdiction.

The Wisconsin Supreme Court went on to state that the further proceedings in the Wisconsin court amounted to a "modification" of any California order regarding custody and Wisconsin now has jurisdiction. Such a finding violates the letter and spirit of 28 U.S.C. § 1738A. The issue is dealt with briefly below.

28 U.S.C. §§ 1738A(d), (f), and (g) generally require jurisdiction to continue with the State which initially had jurisdiction. As was seen above, that State was California. California would lose jurisdiction later only if no "contestant", or the child, lives in California, or California did not continue to have jurisdiction under its own laws. C.C. has lived in California for the time involved so the other factor must be review. The Wisconsin Supreme Court stated that California lost jurisdiction under its own laws on June 19, 1987. (App., pp. 34a-36a). The Wisconsin Supreme Court found that, because the child had then been in Wisconsin for one and one-half years, jurisdiction was created in Wisconsin. (App., p. 36a).

The Wisconsin Supreme Court is saying, in effect, that even when another State is actively asserting jurisdiction over a child and the father of the child is contesting jurisdiction in Wisconsin, the mere passage of time, alone, confers jurisdiction on Wisconsin courts. The most important factor under federal law in these cases is home State jurisdiction. The definition of that phrase states that the home State is determined by finding the residence of the child ". . . immediately preceding the time involved. . .". 28 U.S.C. § 1738A(b)(4). The "time involved" is the beginning of the custody actions in Wisconsin and California in March 1986 and April 1986. Also, the time during which an action is pending is not used to determine custody. See, among others, *Pedowitz v. Pedowitz*, 225 Cal. Rptr. 186, 188 (Cal. App. 5th Dist. 1986); *Boyd v. Boyd*, 653 S.W. 2d 732, 738 (Ct. App. Tenn. 1983); *Mississippi Band of Choctaw Indians*, 490 U.S. at 54. To include the time A.E.H. was in Wisconsin from February 1986 to June 1987, and during which only California had jurisdiction under federal law, would cause 28 U.S.C. § 1738A to become meaningless. Parents would be encouraged to run to other states and delay proceedings in order to make time go by and then "create" jurisdiction. Both California and Wisconsin law on this point agree that these statutes are designed to minimize, and not proliferate, jurisdiction. *Vorpahl v. Lee*, 91 Wis. 2d 7, 10-12 (Ct. App. 1980).[7] (App., pp. 42a-43a).

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[7] In any case, this point shows that the California Court of Appeals decision and the Wisconsin Supreme Court decision cannot be reconciled. All facts relied on by the Wisconsin Supreme Court to assert jurisdiction in Wisconsin occurred by June 17, 1987. After that date, the California trial court awarded sole custody of A.E.H. to C.C., the California Court of Appeals found only California has jurisdiction, and the California Supreme Court denied the petition for review. All facts relied on by the courts of last resort in both states were known when each made its decision.

Previous Trials.

A final factor to be considered by this Court is that there have been trials in both California and Wisconsin concerning C.C.'s abilities as a parent. In the Fall 1987 trial in the Superior Court of California, P.C. and J.H. made a general appearance, hired a law firm to represent their interests, presented evidence, and fully litigated the issues of: (1) whether a non-parent custodian is required to serve the best interests of the child; and (2) whether a parental custodian would be a detriment to A.E.H. The Superior Court of California decided both of those issues against P.C. and J.H. and awarded custody of A.E.H. to C.C. (App., pp. 55a-57a). If this matter proceeds to yet another trial in Wisconsin, the standard that will be used is set forth in *Barstad*, 118 Wis. 2d at 568-569. While phrased slightly differently, the California issues already litigated are identical to the *Barstad* issues. The same parties fully litigated, with competent counsel, the very issues which will be before the trial court in Wisconsin yet again if this case is remanded to the Wisconsin Circuit Court. P.C. and J.H. decided to make their stand in California and they lost. P.C. and J.H. should not be allowed yet another trial on the same issues simply because they do not like the California decision.

In addition, P.C. and J.H. have already litigated the *Barstad* issues in Wisconsin. The "compelling reasons" cited by the Wisconsin Supreme Court in *Barstad* are virtually identical to the factual grounds for termination of parental rights under § 48.415, Wis. Stats. P.C. and J.H. have alleged grounds for termination of C.C.'s parental rights and lost on those issues before a Wisconsin jury. A further hearing on custody under the *Barstad* standard would only reash testimony and evidence from the May 1987 trial.

Most importantly, P.C. and J.H. are not foreclosed from further review of this case in the California courts.

If they believe the situation is so drastically different than it was in 1987 when Judge Cole of California awarded custody of A.E.H. to C.C., they can ask for a new trial based on a change of circumstances. In that way, the best interests of A.E.H. will be determined in the court with jurisdiction.

CONCLUSION

For over five years, C.C. has attempted to obtain custody of his child. This dispute is not with the other parent of A.E.H., but with non-parents. No court has found him to be unfit or in any way incapable of caring for his daughter; yet, this matter continues.

Much has been made about the passage of time and its effect on all parties. A case similar to this case arose in which the issue of jurisdiction to decide the custody of twins came before this Court. Near the end of the Court's opinion, Justice Brennan stated:

> We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.
>
> Whatever feelings we might have as to where the twins should live, however, it is not for us to decide the question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation."

Mississippi Band of Choctaw Indians, 490 U.S. at 53-54 (Citation omitted; Emphasis in original.)

The question before this Court is whether California or Wisconsin should decide the issue of custody of A.E.H. That question is important for the parties to these actions. That issue is also important to the public as the issues addressed by the courts of last resort in California and Wisconsin will affect many other children for years to come. The final resolution of those issues by this Court will guide state courts in similar circumstances so those courts will be able to resolve these disputes properly and protect the interests of thousands of children.

WHEREFORE, Petitioner respectfully requests that the United States Supreme Court grant the Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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August 29, 1991

APPENDICES

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APPENDIX A

WISCONSIN SUPREME COURT

No. 88-2022

IN THE INTEREST OF A.E.H., a Person Under the Age of 18: P.C. and J.H.,
Appellants-Cross Respondents-Petitioners,

v.

C.C.,
Respondent-Cross Appellant.

Argued November 27, 1990.—Decided April 17, 1991.

REVIEW of a decision of the court of appeals. *Reversed and Remanded.*

For the appellants-cross respondents-petitioners there were briefs by *Linda S. Balisle, Michael S. Heffernan* and *Stolper, Koritzinsky, Brewster & Neider, S.C.*, Madison and oral argument by *Ms. Balisle.*

For the respondent-cross appellant there was a brief by *Michael R. Fitzpatrick* and *Brennan, Steil, Basting & MacDougall, S.C.*, Janesville and oral argument by *Mr. Fitzpatrick.*

Guardian Ad Litem brief was filed by *Daniel T. Dillon* and *Nowlan & Mouat*, Janesville, for A.E.H. and oral argument by *Mr. Dillon.*

DAY, J. This case is before the court on a petition for review of a court of appeals decision, *In Interest of A.E.H.*, 152 Wis. 2d 182, 448 N.W.2d 662 (Ct. App. 1989). The court of appeals affirmed an order of the circuit court for Rock County, the Honorable Patrick J. Rude, presiding. The circuit court dismissed an action for custody of A.E.H. on the basis that California, not Wisconsin, has jurisdiction over the custody of the child under the "home state" provision of the Uniform Child Custody Jurisdiction Act (UCCJA).[1] Prior to the Wis-

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[1] Both Wisconsin and California have adopted the Uniform Child Custody Jurisdiction Act. The jurisdiction provision of the UCCJA appears in sec. 822.03(1), Stats. 1987-88, which provides:

> **822.03 Jurisdiction.** **(1)** A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
>
> (c) The child is physically present in this state, and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
>
> (d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with par. (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to de-

consin custody action, the Wisconsin court had assumed and exercised jurisdiction in temporary guardianship, guardianship, and termination of parental rights (TPR) proceedings involving the child. Also prior to the Wisconsin custody proceeding, the California court had assumed and exercised jurisdiction in its own custody proceeding.

The court of appeals affirmed the circuit court's order of dismissal. *Id.* at 199. It held that the circuit court's prior guardianship and TPR proceedings were "custody" determinations within the meaning of sec. 822.02(3), Stats. 1987-88,[2] and are governed by the UCCJA. *Id.* at 194. It held further, that the subject matter in the guardianship and TPR proceedings was so beyond the circuit court's jurisdiction, that "entertaining the actions was a manifest abuse of authority," pursuant to Restatement (Second) of Judgments, sec. 12 (1982).[3] *Id.* at 196.

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termine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

(2) Except under sub. (1)(c) and (d), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequsite for jurisdiction to determine custody.

[2] Section 822.02(3), Stats. 1987-88, provides:

822.02 Definitions. As used in this chapter: . . . (3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings.

[3] The Restatement (Second) of Judgments, section 12 provides:

Section 12. Contesting Subject Matter Jurisdiction. When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the

Under this exception to the doctrine of collateral estoppel, the court of appeals held that the jurisdiction issue could be relitigated. *Id.* at 195.

The issue presented for review is whether or not Wisconsin has jurisdiction, under the UCCJA, sec. 822.03(1), Stats., over the custody of A.E.H. We hold that the guardianship and TPR proceedings were "custody" proceedings under the UCCJA. We agree with this portion of the court of appeals decision. Additionally, we hold that the circuit court's assumption and exercise of jurisdiction in the guardianship proceeding was in accordance with the UCCJA. The court of appeals held that this was a "manifest abuse of authority." We disagree with the court of appeals that this was a "manifest abuse of authority." Finally, we held that the circuit court had jurisdiction under the UCCJA to "modify" the California custody decree. Therefore, the court had jurisdiction under the UCCJA over the custody of the child.

The facts of this case are undisputed, and their sequence is critical. On August 2, 1983, A.E.H. was born to H.H. in the state of California. C.C. was named as the father on A.E.H.'s birth certificate, but he did not marry the child's mother, nor did he live with her after the child

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court's subject matter jurisdiction in subsequent litigation except if:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

was born. A.E.H. also has a half-brother who is eighteen months older than she is. The case before us concerns only the jurisdiction over the custody of A.E.H., not her brother.

A.E.H. resided with her mother and brother in Santa Clara County, California, from her birth until May, 1984. From May, 1984, through May, 1985, the children resided with their maternal grandfather and his wife in Missouri, while her mother was on duty at sea with the United States Navy. During that year, the children visited their maternal relatives in Wisconsin several times, including a ten day visit to the farm of their maternal aunt and uncle, P.C. and J.H.

In May, 1985, the children moved back to California to live with their mother. On February 23, 1986, their mother was murdered. The Navy placed the children in temporary custody with the Santa Clara County juvenile authorities, who placed them in separate foster homes in California. Because the Santa Clara County court did not obtain either child's birth certificate, it did not give notice to the putative fathers of any proceedings involving the children.

On February 24, 1986, the Navy informed the children's grandmother of H.H.'s death. She told the children's uncle, not P.C., who contacted the California authorities and inquired about the children's fathers. The authorities stated that they had no information which identified the fathers.

On February 26, 1986, the children's uncle appeared before the Santa Clara juvenile court. He presented H.H.'s will, which named the children's aunt and uncle, P.C. and J.H., as guardians of the children. The "Findings and Order of Referee," signed by Kristine Mackin McCarthy, referee of the juvenile court, shows that the court dismissed the original petition which was filed on February 25, 1986; released the children from the chil-

dren's shelter to the custody of their uncle; and set aside a jurisdictional hearing which was to have been held on March 14, 1986. The uncle's affidavit describing the return of the children to Wisconsin states:

> At that time I presented the documentation I had with me (H.H.'s will and a signed authorization from J.H. to take control of the children and return them to Wisconsin) to the court and answered their questions to the best of my ability and the extent of my knowledge. The judge then commended my actions on behalf of the children and stated that in her experience she had not seen a family respond so quickly to the type of emergency facing the children. She advised me that any further guardianship procedures would have to be sought in Wisconsin and that the hearing scheduled for March that was indicated on the release order was no longer necessary and it would not be necessary to return the children. As I stated she advised me that all further action would need to occur in Wisconsin.[4]

The children have resided in Wisconsin with their aunt and uncle, P.C. and J.H., since February 26, 1986.

On March 14, the children's uncle contacted the United States Navy in order to obtain the personal effects of the children and their deceased mother. The Navy informed him that a man had appeared on the base, looking for A.E.H. and claiming to be her father. On March 17, 1986, the children's aunt and uncle petitioned the Rock County court of Wisconsin for guardianship of the children. That same day, the children's uncle phoned the

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[4] On September 8, 1986, the Santa Clara Superior Court filed an "Order, Judgment & Decree Regarding Jurisdiction," stating that the release of the child was a "custody determination" within the meaning of 28 U.S.C. 1738A(b)(3), and that the court did not decline its jurisdiction to Wisconsin.

United States Naval base and obtained the name and address of the man claiming to be A.E.H.'s father. The uncle then telephoned the Recorder of San Diego County, California, and requested a certified copy of the children's birth certificates.

On March 18, 1986, the Rock County court (Judge Lussow) awarded the aunt and uncle temporary guardianship of the children and scheduled a hearing for guardianship for May 6, 1986. On March 25, 1986, the aunt and uncle's attorney sent the children's fathers, by regular mail, a copy of the notice for hearing on the petition for guardianship. Notice by publication appeared in a San Diego newspaper on April 2, 9, and 16, 1986. In addition, the San Bernardino County Sheriff's Department tried, unsuccessfully, to personally serve A.E.H.'s father.[5] On June 20, 1986, A.E.H.'s father received notice of the petition and hearing for guardianship by express mail, return receipt requested.

Meanwhile, on April 1, 1986, A.E.H.'s father had filed a paternity and custody action in the San Bernadino Superior Court, California. In the petition to the court, the father stated that he had no information concerning any pending custody proceeding, and that he did not know of any party to the proceeding who had physical custody of A.E.H. or visitation rights with respect to her. Notice of the California custody proceeding was filed with the Rock County court on May 6, 1986. On behalf of the estate of H.H., the children's aunt and grandmother made a special appearance in the California court, objecting to the court's jurisdiction and venue.

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[5] The address at which the sheriff attempted personal service on A.E.H.'s father was the same address that he had given to the military and police authorities on March 14, 1986, when he inquired about the whereabouts of A.E.H. An investigation showed that he had not lived at the given address for at least four years.

On April 14, 1986, the Rock County court filed a notice under the UCCJA, sec. 822.06(3), Stats.[6] The notice stated that the Rock County court assumed jurisdiction over the children on March 17, 1986, and appointed their aunt and uncle as temporary guardians. It also stated that the California custody proceeding should be stayed pending determination of the appropriate forum for determination of the child custody issue.

On June 23, 1986, Judge John H. Lussow, Rock County circuit court judge, participated in a telephone conference concerning jurisdiction under the UCCJA with Judge Frank O. Tetley, a court commissioner serving as judge pro tempore of the San Bernardino Superior Court, California. Both judges made findings on the record that their respective courts had jurisdiction over the custody issue of the children. Judge Lussow asserted jurisdiction under sec. 822.03(1)(b) and (c), Stats. Judge Tetley made a finding that the California paternity action was a form of a custody case, and that it was governed by the UCCJA. He asserted jurisdiction over the custody of the children because California is their "home state" and they had significant contacts with that state.

The Rock County court entered a decree of jurisdiction and convenient forum in favor of P.C. and J.H. on July 3,

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[6] Section 822.06(3), Stats. 1987-88 provides:

822.06 Simultaneous proceedings in other states. . . . (3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with ss. 822.19 to 822.22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

1986 (nunc pro tunc, June 17, 1986). The decree contained thirty-three findings of fact detailing Judge Lussow's chronology of the events leading to the jurisdictional dispute, along with a series of conclusions of law. The court took jurisdiction over the children and ordered that the actions commenced in California by A.E.H.'s father "are hereby stayed" and that the California court "is directed to cease taking any further action in said cases."

On June 26, 1986, Judge Lussow entered a determination and order appointing the children's aunt and uncle as guardians of the person and property of the children. A.E.H.'s father specially appeared, objecting to the jurisdiction of the court and objecting to further proceedings. He never appealed the court's order.[7]

On November 26, 1986, the aunt and uncle filed a new action in Wisconsin for the termination of parental rights of A.E.H.'s father. The child's father specially appeared, objecting to the court's subject matter and personal jurisdiction. Judge Patrick J. Rude, presiding, adopted Judge Lussow's jurisdictional findings from the guardianship proceeding and found that the court had jurisdiction to hear the matter, and it proceeded to a jury trial. On May 16, 1987, a jury determined that C.C. is the father of A.E.H., and it did not terminate his parental rights.

Meanwhile, on February 2, 1987, the child's father filed an action in the United States District Court for the Western District of Wisconsin. In his complaint, he requested that the full orders of the California courts be given full faith and credit in the Wisconsin courts. He also requested the court to declare California as the only

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[7] The father of A.E.H.'s brother has never commenced a paternity action to establish his legal rights to the child, and he has never been adjudged to be the child's father. A.E.H.'s brother has been adopted by P.C. and J.H.

state which may properly exercise jurisdiction over the issue of the custody of A.E.H. pursuant to 28 U.S.C. sec. 1738A, the Parental Kidnapping Prevention Act.[8] The

[8] The Parental Kidnapping Prevention Act provides, in part:

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the some State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (1) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (11) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of

court's order granted the aunt and uncle's motion to dismiss, concluding that it did not have subject matter jurisdiction to determine the issue. *Crouse v. Creanza*, 658 F. Supp. 1522, 1530 (W.D. Wis. 1987).[9]

On June 19, 1987, the child's aunt and uncle filed a motion in Rock County for legal custody of A.E.H.[10] The child's father specially appeared and filed a motion to dismiss, stating that California has jurisdiction over the custody of his daughter and that the issues of the best interests of his daughter and the proper custodial for his daughter have already been litigated in California.

On January 4, 1988, the San Bernardino Superior Court entered a judgment incorporating the Wisconsin jury verdict naming C.C. as the father of A.E.H. The

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this section continues as long as the requirement of subsection (cX1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

[9] On a motion by the child's aut and uncle, this court took judicial notice of certified copies of the summons and complaint, motion to dismiss, and the order issued by the court in the federal proceeding.

[10] They moved the court, pursuant to sec. 767.24(1)(c), Stats. 1987-88, for an order awarding them legal custody of A.E.H., provided they could demonstrate to the court "compelling reasons" to award custody of the child to a non-parent, as that term is used in *Barstad v. Frazier*, 118 Wis. 2d 549, 348 N.W.2d 479 (1984).

court also awarded C.C. sole custody of his daughter. The child's aunt and uncle appealed. The California Court of Appeals affirmed the decision, holding that California had jurisdiction over the child under the UCCJA because California was the child's "home state." The court stated:

> Wisconsin was not exercising jurisdiction in conformity with the UCCJA under any of the listed grounds . . . . Since there was no valid jurisdiction, California did not have to defer to Wisconsin nor do the inconvenient forum provisions apply . . .. Since Wisconsin did not have jurisdiction under its own laws (UCCJA) then California was not required by the FPKPA (the federal parental Kidnapping Prevention Act) to give full faith and credit to Wisconsin's custody determination.

The child's aunt and uncle petitioned for review of the California Supreme Court.

On October 4, 1988, Judge Rude of the Rock county circuit court dismissed the Wisconsin custody proceeding. He adopted the findings and judgment of the California Court of Appeals and concluded that California is the "home state" of A.E.H. and that California has jurisdiction over the custody of the child. The court ordered all future proceedings regarding placement and custody of the child to take place in California. The order for dismissal was entered on October 7, 1988. On October 18, 1988, the court granted the child's aunt and uncle a stay of enforcement of the court's order for dismissal pending appeal.

The child's aunt and uncle appealed, and her father cross-appealed. The court of appeals affirmed the circuit court's dismissal of the custody action. *In Interest of A.E.H.*, 152 Wis. 2d at 186. After reviewing several decisions from other jurisdictions, the court of appeals held that the UCCJA applies to guardianship and TRP pro-

ceedings, since these proceedings are "custody" determinations within the meaning of sec. 822.02(3), Stats. *Id.* at 194. The court of appeals then concluded that the Wisconsin jurisdiction determinations in the guardianship and TPR proceedings were a "manifest abuse of . . . authority," and the jurisdiction issue could be relitigated under the Restatement (Second) of Judgments, sec. 12. *Id.* at 196.

The court held that in order for the court to assume jurisdiction, one of the four criteria listed in sec. 822.03 (1), Stats., had to be met. Under the facts, none of the criteria had been met. *Id.* at 199. Under subsection (a) of the statute, neither party contested that California was the child's "home state" as defined in sec. 822.03 (1)(a), Stats. *Id.* at 196. Under subsection (b), the child did not have significant contacts with the state of Wisconsin at the time of commencement of the guardianship proceedings. *Id.* at 196-198. Under subsection (c), there were no facts in the record to sustain a finding of jurisdiction on the basis of an emergency situation or abandonment of the child. *Id.* at 198. Finally, subsection (d) did not apply because California has jurisdiction as the child's "home state" and it has not declined jurisdiction. *Id.* The court of appeals concluded that proper jurisdiction of the custory issue lies in California, not Wisconsin. *Id.* at 199. The child's aunt and uncle then petitioned this court for review.

On October 11, 1988, the child's father filed a motion in Rock County to enforce the California custody decree pursuant to sec. 822.15(1), Stats.[11] The action was stayed

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[11] Section 822.15(1), Stats. 1987-88 provides:

822.15 Filing and enforcement of custody decree of another state. (1) A certified copy of a custody decree of another state may be filed in the office of the clerk of any circuit court of this state. The clerk shall treat the decree in the same manner as a custody decree of a circuit court of this state. A custody decree so filed has the same effect and shall be enforced in

by this court pending action on the petition for review. On October 4, 1989, this court granted the petition.

At issue is the Rock county circuit court's exercise of jurisdiction under the UCCJA, sec. 822.03(1), Stats., over the custody of A.E.H. In order for a court to exercise its power over a case, it must have both subject matter jurisdiction and personal jurisdiction. *Hester v. Williams*, 117 Wis. 2d 634, 641, 345 N.W.2d 426 (1984). Subject matter jurisdiction is the power of the court to hear and decide a particular case or controversy. *See Sayfert v. Seyfert*, 201 Wis. 223, 228, 229 N.W. 636 (1930). It is conferred upon the court solely by the constitution and state statutes. *See In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 548-549, 307 N.W. 2d 881 (1981). We note, however, that "[t]he circuit courts of Wisconsin are constitutional courts and, unlike special courts which may be created from time to time by the legislature, under art. VII, sec. 2, are courts of plenary jurisdiction. They 'do not depend solely upon statute for their powers.'" *Id.* at 549 (quoting *Stevenson v. Milwaukee County*, 140 Wis. 14, 17, 121 N.W.2d 654 (1909)). "No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Mueller v. Brunn.*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982). Therefore, we are not reviewing whether the circuit court in this case had subject matter jurisdiction to decide the custody of A.E.H. Article VII, sec. 8, of the Wisconsin Constitution makes it clear that the court did possess such jurisdiction over the custody matter. *See Eberhardy*, 102 Wis. 2d at 550.

What we are reviewing then is whether, under the UCCJA, sec. 822.03(1), Stats., it was proper for the Wisconsin circuit court, "which is *competent* to decide child custody matters" to "*make a child custody determi-*

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like manner as a custody decree rendered by a circuit court of this state.

tion," This "jurisdiction" statute concerns the child's contacts with the state in which the custody determination will be made. A "contacts" analysis is normally performed in the context of personal jurisdiction; i.e., for a court to exercise personal jurisdiction over a nonresident defendant, the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). For the status adjudication of custody, the UCCJA encourages "*maximum* contacts" with a state where the custody determination will be made.[12] There must be maximum rather than minimum contacts with the state." Commissioners Comment to UCCJA sec. 3(a)(2), 9 U.L.A. 145 (1988). This is the policy of the UCCJA, which, as a matter of comity, is meant to:

> [a]ssure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and family have the closest connection and care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and family have a closer connection with another state; . . . .

Section 822.01(1)(c), Stats.

The application of this statutory concept of jurisdiction to the facts of this case is a question of law. *Dragoo*

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[12] The United States Supreme Court allowed to a particularized jurisdictional rule, such as the UCCJA, in *Schaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977): "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudication of status, are inconsistent with the standard of fairness."

v. Dragoo, 99 Wis. 2d 42, 43 298 N.W.2d 231 (Ct. App. 1980). The issue should be decided without reference to the circuit court's decision. *Ball v. District No. 4, Area Bd.*, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984).

We first determine, as did the court of appeals, whether the Wisconsin guardianship and TPR proceedings were "custody proceedings" within the meaning of the UCCJA, sec. 822.02(3), Stats. If so, the other provisions of the UCCJA which control "custody" matters also control the disposition of this case. As noted by the court of appeals, several other states have concluded a guardianship proceeding, with respect to a minor, is covered under the term "custody proceeding" and it must comply with the UCCJA. *See Matter of Guardianship of Walling*, 727 P.2d 586, 690 (Okla. 1986); *Ray v. Ray*, 494 So. 2d 634, 637 (Ala. Civ. App. 1986); *Gribkoff v. Bedford*, 76 Or. App. 695, 711 P.2d 176, 178 (1985); *In re Guardianship of Wonderly*, 423 N.E.2d 420, 423-424 (Ohio 1981). These states have adopted the UCCJA and have definition of "custody proceeding" similar to Wisconsin's definition.

More importantly, the Commissioners' comment to the definition of "custody proceeding" under the UCCJA states that ' "custody proceeding' is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody." 9 U.L.A. 134. We conclude that the guardianship proceeding was a "custody proceeding" within the meaning of sec. 822.02 (3), Stats.

As for a TPR proceeding, if the parental rights are not terminated, the parent may retain guardianship and custody of the child. If the parental rights are terminated, the court transfers guardianship and custody of the child to another individual or agency. *See* secs. 48.427

(2)-(4), Stats. 1987-88.[13] The TPR proceeding ultimately determines whether a parent will retain custody and guardianship of a child. Interpreting "custody proceeding" in a broad sense, as the drafters of the UCCJA intended, we conclude that the TPR proceeding was a "custody proceeding" within the meaning of sec. 822.02 (3), Stats. Similarly, the determinations reached in the guardianship and TPR proceedings, were "custody determinations" under section 822.02(2), Stats. 1987-88,[14]

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[13] Sections 48.427(2)-(4), Stats. 1987-88 provides:

48.427 Dispositions. . . . (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.

(3) The court may enter an order terminating the parental rights of one or both parents. If the rights of both parents or of the only living parent are terminated, the court shall either:

(a) Transfer guardianship and custody of the child pending adoptive placement to:

1. A county department authorized to accept guardianship under s. 48.57(1)(c) or hm).

. . . .

3. A child welfare agency licensed under s. 48.61(5) to accept guardianship.

4. The department.

5. A relative with whom the child resides, if the relative has filed a petition to adopt the child.

6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.

(b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1 to 4 and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.

(4) The court may enter an order terminating the parental rights of one or both parents and placing the child in sustaining care under s. 48.428.

[14] Section 822.02(2), Stats., 1987-88 provides:

822.02 Definitions. As used in this chapter: . . . **(2)** "Custody determination" means a court decision and court orders

and the decrees the court issued were "custody decrees" under sec. 822.02(4), Stats.[15]

Having determined that the Wisconsin proceedings were "custody proceedings" and covered under the UCCJA, these proceedings had to conform with the UCCJA. In determining whether a court may make a "child custody determination" under the UCCJA, it must first ascertain whether the court had jurisdiction under the UCCJA. *Priscilla S. v. Albert B.*, 102 Misc. 2d 650, 424 N.Y.S.2d 613, 616 (1980); *Holt v. District Court, Etc.*, 626 P.2d 1336, 1341 (Okla. 1981). The jurisdictional requirements of the UCCJA must be met only at the commencement of the proceedings in this state. *Mayer v. Mayer*, 91 Wis. 2d 342, 349, 283 N.W.2d 591 (Ct. App. 1979).

The "custody proceedings" were commenced on March 17, 1986, when the child's aunt and uncle filed the guardianship petition in Wisconsin. The notice filed pursuant to sec. 822.06(3), States., states that the Wisconsin court assumed jurisdiction on that day and it also requested the Califonria court to stay the pending custody proceeding in that state. Judge Lussow stated, on the record during the telephone conference with Judge Tetley, that Wisconsin had assumed jurisdiction over the custody of A.E.H. under section 822.03(1)(b) and (c), Stats.

For a finding of jurisdiction under subsection (b) of the statute, "the child and at least one contestant, [must] have a significant connection with this state." Section 822.03(1)(b), Stats. In addition, "substantial evidence

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and instructions providing for legal custody, physical placement or visitation rights.

[15] Section 822.02(4), Stats., 1987-88 provides:

822.02 **Definitions.** As used in this chapter: . . . (4) "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree.

concerning the child's present or future care, protection, training, and personal relationships" must be available in this state. *Id.* According to the Commissioners' comments, subsection (b) "comes into play either when the home state test cannot be met or as an alternative to that test." 9 U.L.A. 144, P.C. and J.H. do not assert that Wisconsin is the child's "home state." Moreover, the record reflects that the child did not live in Wisconsin for at least six consecutive months "immediately preceding the time involved" to meet the "home state" definition under sec. 822.02(5), Stats.[16] Wisconsin therefore could not assume jurisdiction under the "home state" provision.

The Commissioners' comment also states that under subsection (b), "[s]hort-term presence in the state is not enough even though there may be an intent to stay longer . . .." 9 U.L.A. 145. Therefore, the unilateral movement of a child to another state is not enough to confer jurisdiction under subsection (b). *Id.* The child's father relies on this to show Wisconsin had no jurisdiction under subsection (b). However, the child's presence in Wisconsin is not P.C. and J.H.'s basis for claiming jurisdiction under subsection (b). They claim that Wisconsin should assume jurisdiction because the best interests of the child will be served due to her significant contacts with Wisconsin and her lack of contacts with California. As the Commissioners noted, the child's interest is served "when the forum has optimum access to relevant evidence about the child and family." 9 U.L.A. 145. On March 17, 1986, when the guardianship petition was filed, Judge Lussow

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[16] Section 822.02(5), Stats, 1987-88 provides:

822.02 Definitions. As used in this chapter: . . . **(5)** "Home state" means the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.

had no knowledge of the child's relatives in California. At that time the child would not likely have any present or future personal relationships with anyone in California or perhaps even have any present or future contacts with California at all. After all, A.E.H. was in California because that was the location of her mother's duty assignment from the Navy. She did not have any known relatives in California; Judge Lussow was not aware that she had any relationships with anyone in California; or that evidence of her future care and training would be in California. All evidence concerning the child's present and future care, protection and training was in Wisconsin, since that is where all of the child's then-known relatives lived, including her brother. This, in itself, is a significant connection between the child and Wisconsin. The facts satisfy both parts of subsection (b), enabling the Wisconsin court to assume jurisdiction under the UCCJA.

Even though only one subsection of sec. 822.03(1), States., need be satisfied for a finding of jurisdiction, we will examine Judge Lussow's assertion of jurisdiction under subsection (c) of the statute as well. Section 822.03(1)(c)

> retains and reaffirms *parens patriae* jurisdiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. This jurisdiction exists when a child has been abandoned, and in emergency cases of child neglect. Presence of the child in the state is the only prerequisite.

9 U.L.A. 145.

Clearly, at the time of the filing of the guardianship petition, A.E.H. was present in the state of Wisconsin. However, the record does not reveal any evidence of mistreatment, child neglect, or abuse necessary to assume jurisdiction in an "emergency" situation. As for aban-

donment, assumption of jurisdiction would be appropriate if the child were without proper care, custody or support, and in need of immediate protection. *See In re B.R.F.*, 669 S.W.2d 240, 247 (Mo. App. 1984). At the time of the filing of the guardianship petition, A.E.H. was under the care of her Wisconsin relatives. Even though her mother had died and her father was unknown, she had not been "abandoned" in Wisconsin as she may have been in California. The facts do not satisfy the requirements of subsection (c) in order for the Wisconsin court to assume jurisdiction over the custody of A.E.H. under that provision of the UCCJA.

Finally, although not relied upon by Judge Lussow, we will examine subsection (d) of the jurisdictional statute in our independent review of this case. This section "provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, *or would*, assume jurisdiction under the other criteria of this section." 9 U.L.A. 145 (emphasis added). We focus on the second section of subsection (d), which refers to a state which has declined to exercise jurisdiction. On February 26, 1986, when the California court released A.E.H. to the custody of her uncle, the court dismissed the original petition regarding placement of the child and, according to the child's uncle, advised him that "any further guardianship proceedings would have to be sought in Wisconsin." This evidence clearly indicates that the court intended to relinquish any jurisdiction it had over the custody of the child and allow Wisconsin to assume jurisdiction. This fact was known to Judge Lussow.

The father of the child contends that the court never relinquished jurisdiction. He relies on the California court's "Judgment and Decree Regarding Jurisdiction" stating that the court did not decline jurisdiction. This document was filed long after the jurisdictional dispute

arose between Wisconsin and California. Moreover, it was signed by Judge Leonard P. Edwards, of the Santa Clara County Superior Court, who is not the same person who signed the California custody release. We do not find the document persuasive or conclusive as to whether the California court intended to relinquish jurisdiction when it released the children to their uncle advising him that custody would have to be determined in Wisconsin. We find much more persuasive the document filed on February 26, 1986, dismissing the original petition regarding placement of the child and releasing her to the custody of her uncle. This is the document which was in existence on May 17, 1986, the day the guardianship petition was filed in Wisconsin.

We conclude that at the time the guardianship petition was filed, California had relinquished jurisdiction over the custody of A.E.H., and as previously discussed, it was in the child's best interests that Wisconin assume jurisdiction. The facts satisfy subsection (d), enabling the Wisconsin court to assume jurisdiction under this portion of the UCCJA.

We hold that at the time the custody proceeding was commenced in Wisconsin (the day the child's aunt and uncle filed the guardianship petition) the jurisdictional requirements of the UCCJA wert met under sec. 822.03 (1)(b) and (d), Stats., and the Wisconsin court properly assumed jurisdiction over the custody of A.E.H. and her brother.

After the custody petition is filed, a court which has properly assumed jurisdiction under the UCCJA may nevertheless be required under the UCCJA to decline to exercise that jurisdiction. *Priscilla S. v. Albert B.*, 424 N.Y.S.2d at 616; *Holt v. District Court, Etc.*, 626 P.2d at 1341. This will occur if a custody proceeding is pending in another state, *see* sec. 822.06(3), Stats., or if the court

finds that it is an inconvenient forum and the court of another state is a more appropriate forum. *See* sec. 822.07, Stats.[17] In both situations the UCCJA calls for

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[17] Section 822.07, Stats. 1987-88 provides:

822.07 **Inconvenient forum.** **(1)** A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child. Motions under this subsection may be heard on the record as prescribed in s. 807.13.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state;

(b) If another state has a closer connection with the child and family or with the child and one or more of the contestants;

(c) If substantial evidence concerning the child's present or future care, protection, training and personal relationships is more readily available in another state;

(d) If the parties have agreed on another forum which is no less appropirate; and

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in s. 822.01.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a

the court of the fourm state to communicate with the court of the other state and exchange information to the end that the issue is litigated in the more appropriate forum. Section 822.06(3) and 822.07(4), Stats. The communication may be conducted on the record by telephone conference. Section 822.06(4), Stats.[18]

When Judge Lussow and Judge Tetley participated in the telephone conference, both judges found that their respective state courts properly assumed jurisdiction under the UCCJA and could exercise that jurisdiction.

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moving party stipulate consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this chapter if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

[18] Section 822.06(4), Stats. 1987-88 provides: . . .

822.06 Simultaneous proceedings in other states. . . . (4) The communication between courts called for by sub. (3) or s. 822.07(4) may be conducted on the record by telephone conference to which the courts and all counsel are parties.

Judge Lussow asserted jurisdiction under the "significant contacts" and "*parens patriae*" provisions of the UCCJA. We have previously determined that jurisdiction was proper under subsection (c) of the UCCJA, the "significant contacts" provision, and subsection (d). Judge Tetley asserted jurisdiction under the "home state" provision. The drafters of the UCCJA anticipated such a situation occurring:

> In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 and 7 [secs. 822.06 and 822.07, Stats.] are used to assume that only one state makes the custody decision.

9 U.L.A. 144.

First, under sec. 6 (sec. 822.06, Stats.), "[a] court of this state shall not exercise its jurisdiction under this chapter if *at the time of filing the petition* a proceeding concerning the custody of the child was *pending* in a court of another state exercising jurisdiction substantially in conformity with this chapter . . .." (Emphasis added.) On March 17, 1986, when the child's aunt and uncle filed the guardianship petition, the California custody proceeding had not been pending and California had not exercised jurisdiction over the custody of the child. Section 822.06(1), Stats., sec. 6 of the UCCJA, did not prevent the Wisconsin court from exercising jurisdiction over the custody of A.E.H. in the guardianship proceeding because the Wisconsin custody petition was filed first. Other courts have followed this rationale in determining which could should proceed in a jurisdictional deadlock under the UCCJA. *Scheafnocker v. Sheafnocker*, 514 A.2d 172, 178 (Pa. Super 1986); *Hickey v. Baxter*, 461 So. 2d 1364, 1369 (Fla. App. 1 Dist. 1984); *In Matter*

of Marriage of Steadman, 671 P.2d 808, 809 (Wash. App. 1983); *Revere v. Revere*, 389 So. 2d 1277 (La. 1980).

In *Steadman*, the court noted that

> [t]he UCCJA is not a device by which the singular and exclusive jurisdiction of any state to determine custody can be determined with crystalline finality. Rather, it affords the means by which a court may determine its own jurisdiction by applying a set of rational principles (citations omitted). As between states which have adopted the act, the state in which action is brought first will be permitted to go forward (citation omitted).

671 P.2d at 809. Similarly, in *Scheafnocker*, the court held that

> [i]t is undisputed that the appellee filed her custody complaint before the appellant's submission of his petition in Texas seeking the same relief. As a result, the Pennsylvania court was not required to decline jurisdiction since in October of 1983 there was no other court which was a more appropriate forum.

514 A.2d at 178. In *Revere*, the court referred to the jurisdictional deadlock which is present in the case before us.

> It is evident that jurisdiction may exist in two differnt states under the home state and significant connection standards. When this occurs, it is not necessary that the significant connection state defer in every case to the home state. The conflict is avoided by reference to priority of filing . . ..

389 So. 2d at 1280.

Finally the Commissioners' comment to section 6 of the UCCJA specifically refers to a "first to file" priority

for a court that has properly assumed jurisdiction under the UCCJA.

> When the courts of more than one state have jurisdition under sections 3 or 14 [sec. 822.03 and 822.14, Stats.],[19] priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 [sec. 822.07, Stats.] may result in the handling of the case by the other court.

9 U.L.A. at 220.

Under section 7 of the UCCJA, sec. 822.07, Stats., the inconvenient forum provision, the court may take into account five factors listed in sec. 822.07(3), Stats., to determine if it is in the interest of the child that another state assume jurisdiction. First, the court may consider "[i]f another state is or recently was the child's home state . . .." Section 822.07(3)(a), Stats. As previously stated, sec. 822.02(5), Stats., defines "home state for jurisdictional purposes. The "home state" is the state in which the child lived with the child's parents, a parent or a person acting as a parent for at least six consecutive months "immediately precluding the time involved . . .." Section 822.02(5), Stats. The record reflects that the chlid resided with her mother in California for nine

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[19] Section 822.14, Stats. 1987-88 provides:

> **822.14 Modification of custody decree of another state. (1)** If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree and the court of this state had jurisdiction.
>
> **(2)** If a court of this state is authorized under sub. (1) and s. 822.08 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with s. 822.22.

months up to the time her mother died, making California the "home state" under the UCCJA. This first factor weighs in favor of California.

Second, the court may consider "[i]f another state has a closer connection with the child and family or with the child and one or more of the contestants . . .." Section 822.07(3)(b), Stats. The child was born in California and spent nearly half of her life there. Her connection with Wisconsin is that she and her temporary guardians reside in Wisconsin. The "family's only connection with California is its relationship with the child and her mother who used to be stationed there. California does not have a closer connection with the child *and* her "family." One of the contesants, the child's then-putative father does have a close connection with California. He resides in that state. His only connection with Wisconsin is that his then- alleged daughter and her relatives reside in this state. Under the statute, California has a closer connection with the child and one of the contestants. The second factor weighs in favor of California.

The third factors the court may consider is "[i]f substantial evidence concerning the child's present or future care, protection, training, and personal relationship is more readily available in another state . . .." Section 822.07(3)(c)), Stats. As previously stated, under sec. 822.03(1)(b), Stats., this factor does not weigh in favor of California.

Fourth, the court may consider "[i]f the parties have agreed on another form which is no less appropriate . . ..." Section 822.07(3)(d), Stats. The parties have not agreed on any forum.

Finally, the court may consider "[i]f the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in s. 822.01." Section 822.07(3)(e), Stats. The general underlying purposes of the UCCJA are avoiding shifting children from state to

state, avoiding abductions, litigating custody in the state which has the closest connection with the child and the family, i.e., her maternal relatives, and facilitating enforcement of other state's custody decrees. *See generally* sec. 822.01(1), Stats. Wisconsin's exercise or jurisdiction would not contravene any of these purposes. In fact, it would be consistent with these purposes. In particular, Wisconsin's exercise of jurisdiction would ensure that the custody of the child is litigated in the state where the child and her "family" have the closest connection, or maximum contacts, and in the state where significant evidence concerning the child's care is readily available. *See* sec. 822.01(1)(c), Stats. This final factor does not weigh in favor of California.

Considering all five factors listed in sec. 822.07(3), Stats., it would not have been in the best interests of the child to find Wisconsin an inconvenient forum and move the litigation of custody to California. Therefore, neither of the mechanisms in section 6 nor section 7 of the UCCJA required Wisconsin to decline the exercise of jurisdiction over the custody of the child.

On June 26, 1986, the Wisconsin court exercised its jurisdiction in awarding the child's aunt and uncle guardianship of the child. The child's aunt and uncle have asked us to apply the principles of *res judicata* and collateral estoppel to the Wisconsin court's original determination of jurisdiction. Under the doctrine of *res judicata*, or claim preclusion, a judgment "on the merits" bars a second lawsuit involving the same parties based on the same cause of action. *Lawlor v. National Screen Service*, 349 U.S. 322, 326 (1955). Under the doctrine of collateral estoppel, or issue preclusion, a judgment on the merits between the same parties in a prior suit "precludes litigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Id.* In addition, section 12 of the UCCJA, sec. 822.12, Stats., provides that a cutody decree is conclusive as to

all issues of fact and law decided and as to the custody determination made unless and until that determination is modified.[20]

Because a custody decree may be modified, it does not have absolute finality; but as long as it has not been modified, it is binding as a final judgment. 9 U.L.A. at 275. As previously determined, the guardianship decree is a "custody decree." The Wisconsin judgment on the merits bars relitigation of guardianship of the child between the same parties. Therefore, the *claim* of guardianship over the child is *res judiciata.* Under section 12 of the UCCJA, the guardianship decree or "custody decree" is conclusive as to the *issue* of jurisdiction until it is modified.

On November 26, 1986, when the child's aunt and uncle filed the TPR action, they were, in effect, requesting a "modification" of the prior custody decree—the Wisconsin guardianship decree decree. *See* sec. 822.02(7), Stats. Under sec. 14 of the UCCJA, a court's jurisdiction must be *reexamined* in order to modify a custody decree. *See* sec. 822.14, Stats. Judge Rude, faced with the jurisdiction objection in the TPR proceeding, reexamined the court's jurisdiction. He agreed with Judge Lussow's thirty-three findings in the guardianship proceeding and adopted them, concluding that the Wisconsin court had jurisdiction to hear the TPR matter.

On June 19, 1987, when the child's aunt and uncle filed the petition for legal custody in Wisconsin, they

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[20] Section 822.12, Stats. 1987-88 provides:

822.12 Binding force and res judicata effect of custody decree. A custody decree rendered by a court of this state which had jurisdiction under s.822.03 binds all parties who have been served in this state or notified in accordance with s. 822.05 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this chapter.

were, in effect, requesting a "modification" of the prior existing custody decree—the California custody decree. *See* sec. 822.14, Stats. Judge Rude reexamined the court's jurisdiction. This time, he concluded that California was the child's home state and that California, not Wisconsin, had jurisdiction over the custody of the child.[21] He therefore dismissed the action. We do not view this as a collateral attack on Judge Rude's prior determination of jurisdiction in the TPR proceeding or as a collateral attack on Judge Lussow's determination of jurisdiction in the guardianship proceeding. Each proceeding was a separate action, and each proceeding required a separate determination of jurisdiction. Judge Rude's finding of lack of jurisdiction in the aunt and uncle's petition for legal custody did not challenge the prior Wisconsin guardianship and TPR determinations. What it did was serve as a basis of dismissal of the petition for legal custody.

Moreover, even if Judge Rude's dismissal of the petition for legal custody for lack of jurisdiction could be viewed as a collateral attack on the Wisconsin court's prior jurisdiction determinations, we do not hold that "the subject matter of the action was so plainly beyond the court's jurisdiction" in both the TPR proceeding and the guardianship proceeding that entertaining the actions was a "manifest abuse of authority" pursuant to the

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[21] The child's aunt and uncle claim error in that neither Judge Rude, in the petition for legal custody, nor the court of appeals had before it the guardianship record containing Judge Lussow's thirty-three findings of fact in his jurisdictional decree. The court can only review what the parties have put before it. If P.C. and J.H. thought it was crucial to have the guardianship record before Judge Rude, they could have filed all the relevant documents with the court in their petition for legal custody of A.E.H. On appeal, they could have appended the relevant documents to their brief or made a motion to supplement the record. We note that on review to this court, P.C. and J.H. did make a motion to order transmittal of the guardianship record. This court granted the motion, and now has before it the prior jurisdiction determinations.

Restatement (Second) of Judgments, sec. 12.[22] As the reporter's note to the Restatement observes: "Cases involving plain excess of jurisdiction are rare." *Id.* at 127. We construe the terms "manifest abuse of authority" narrowly, and reserve their application to egregious cases where a court lacks the power to hear a particular class of case. *See, e.g., State v. Bartunek*, 12 Ohio App. 2d 141, 231 N.E.2d 326 (1967) (where a probate court ruled on the constitutionality of a city zoning ordinance). Otherwise, *every* jurisdictional error could arguably be characterized as a manifest abuse of authority, and the exception would be rendered meaningless. However, we conclude that what Judge Lussow did, in his thirty-three findings of fact (which Judge Rude later adopted in the TPR proceeding), is an example of what is *not* a manifest abuse of authority. As previously determined, Judge Lussow properly determined that the Wisconsin court had jurisdiction over the custody of A.E.H. and properly exercised that jurisdiction.

As the Commissioners' comment to section 6 of the UCCJA states, "[o]nce a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14." 9 U.L.A. at 220. Therefore, once the Wisconsin court awarded the child's aunt and uncle guardianship, the exercise of jurisdiction over the custody of the child by another court was governed by secs. 8 and 14 of the UCCJA. California exercised its jurisdiction over the custody of the child on January 4, 1988, when it issued a custody decree. Whether that exercise of jurisdiction was in conformity with sections 8 and 14 of the UCCJA is not for us to decide. The effect of the California custody decree though, required the exercise of jurisdiction over the custody of the child by another court to conform with sections 8 and 14 of the UCCJA. The Wisconsin court exercised its jurisdiction over the "custody" of the child again, in the TPR proceeding. However, it is the

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[22] Restatement, *supra* note 3.

question of Wisconsin's exercise of jurisdiction in the petition for legal custody of A.E.H. on which we will focus, because this is at issue on review. In order for the Wisconsin court to exercise jurisdiction in that matter, it had to conform with secs. 8 and 14 of the UCCJA. *See* 9 U.L.A. at 220.

Section 8 of the UCCJA, sec. 822.08, Stats.,[23] incorporates the "clean hands" doctrine. 9 U.L.A. at 251. "Under this doctrine courts refuse to assume jurisdiction to re-examine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain physical custody of the child in violation of the decree." *Id.* The record does not reflect and the child's father does not contend that the child's aunt and uncle engaged in such conduct in order to retain custody of the child once they were awarded guardianship. Section 822.08, Stats., therefore does not apply.

Section 14 of the UCCJA sec. 822.14, Stats., deals with the continuing jurisdiction of a court which has

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[23] Section 822.08, Stats. 1987-88 provides:

822.08 **Jurisdiction declined by reason of conduct.** **(1)** If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

rendered a custody decree. Its purpose is to avoid forum shopping and to achieve stability of custody arrangements. 9 U.L.A. at 292. This section:

> declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3 [sec. 822.03, Stats.]. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere.

Id.

Under sec. 822.14, Stats., the Wisconsin court shall not "modify" the California custody decree unless California has "lost" jurisdiction by not fulfilling the jurisdictional prerequisites of the UCCJA, or unless it has declined to assume jurisdiction to modify the custody decree. The record does not reveal that California has declined to assume jurisdiction to modify its custody decree. However, it may have "lost" jurisdiction because it "does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter . . . ." Section 822.14(1), Stats. It is now appropriate for this court to examine California's jurisdictional contacts under the UCCJA.[24]

Under sec. 822.14, Stats., jurisdiction must exist at the time the petition for modification is filed. 9 U.L.A. at 293. *See also Bull v. Bull*, 109 Mich. App. 328, 311 N.W.2d 768, 773 (1981). The petition for modification —the aunt and uncle's petition for legal custody—was

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[24] This examination does not, however, void or affect the prior California custody decree.

filed on June 19, 1987. At that time, C.C. had already been adjudicated the father of the child, and the child had resided in Wisconsin with her aunt and uncle for nearly sixteen months.

Again, we examine the jurisdictional requirements of sec. 822.03, Stats. to determine, first, whether California had sufficient contacts with the case to satisfy section 3 of the UCCJA. Under sec. 822.03(1)(a), the "home state" provision, California was no longer the "home state of the child at the commencement of the proceeding," June 19, 1987. *Id.* Immediately preceding the time involved, the child had lived with her aunt and uncle in Wisconsin for over six consecutive months. *See* sec. 822.02(5), Stats.

Under subsection (b) of the statute, the child and her father must have had a significant connection with California, and substantial evidence concerning the child's present or future care, protection, training, and personal relationships had to exist in California. Section 822.03 (1)(b), Stats. Again, the child's father resides in California. The child was born in that state and spent nine consecutive months after her birth and nine consecutive months prior to her mother's death in that state. Despite the fact that the child's father lives in California, a substantial amount of evidence concerning the child's present and future care relationships exists in Wisconsin. By June 19, 1987, the child had spent about year and a half in Wisconsin. The record reveals that at that time, she had adjusted well to life on her aunt and uncle's farm. She identified the farm as her home, where she lived and played with her brother. She also developed a very close, almost daily connection with her other aunt and uncle that live nearby, and their two children who are close to her age. The child was seen by a psychologist shortly after her return to Wisconsin, and she was diagnosed as having an "Adjustment Reaction With Mixed Emotional Mood." She continues to receive psychological

counseling. The record lacks any similar substantial evidence which existed in California.

Third, subsection (c) does not apply because the initial prerequisite that the child be present in California had not been satisfied.

Finally, California could not assume jurisdiction under subsection (d) either. The first provision would not apply either because Wisconsin did not decline to exercise its jurisdiction. California, therefore, did not have sufficient contacts with the case to assume jurisdiction under section 3 of the UCCJA at the time the petition for legal custody was filed in Wisconsin. Under sec. 822.14, Stats., the Wisconsin court was not prohibited from "modifying" the California custody decree. We conclude that the Wisconsin court had jurisdiction to hear and decide the custody matter which was brought by the child's aunt and uncle.

The child's father claims that under 28 U.S.C. sec. 1738A, the Parental Kidnapping Prevention Act (PKPA), Wisconsin did not have jurisdiction over the custody of the child. The PKPA concerns a state's enforcement of another state's child custody determination. *See* 28 U.S.C. sec. 1738A(a). It also governs a state's jurisdiction to modify another state's custody determination. *See* 28 U.S.C. sec. 1738A(f). We consider only the jurisdictional provision and its relation to the case before us. To the extent that the PKPA conflicts with the UCCJA, the PKPA preempts the UCCJA. *Sams v. Boston*, 384 S.E.2d 151, 156 (W. Va. 1989); *Murphy v. Woerner*, 748 P.2d 749, 750 (Ala. 1988).

28 U.S.C. sec. 1738A(f) provides that a state court may modify another state court's custody determination if it has jurisdiction to make a child custody determination, and the court of the other state no longer has jurisdiction or has declined to exercise that jurisdiction. This is the only instance, under the PKPA, in which more

than one state may exercise jurisdiction over a custody dispute. *Thompson v. Thompson*, 484 U.S. 174, 177 n.2 (1988). We have already determined that the California court no longer has jurisdiction to modify the custody decree under secs. 822.14 and 822.03, Stats., and that the Wisconsin court has jurisdiction to make the child custody determination. Therefore, under the PKPA, the Wisconsin court may modify the California court's custody decree.

We hold that guardianship and TPR proceedings were "custody proceedings" within the meaning of sec. 822.02 (3), Stats. Therefore, the UCCJA controls the disposition of this case. Under the UCCJA, the Wisconsin court assumed jurisdiction over the custody of A.E.H. in the guardianship proceeding and properly exercised that jurisdiction in accordance with the provisions of the UCCJA. We hold further that the Wisconsin court had jurisdiction under the UCCJA to "modify" the California custody decree, and this exercise of jurisdiction did not conflict with the PKPA. The matter should be returned to the circuit court to determine the matter of custody.

By the Court.—The decision of the court of appeals is reversed and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

CHIEF JUSTICE HEFFERNAN took no part.

APPENDIX B

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

E003516
Super. Ct. OCV 38045

C.C.,
Plaintiff and Respondent,

v.

J.H.,
Defendant and Appellant.

[Filed Sept. 6, 1988]

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank O. Tetley, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Affirmed.

Covington & Crowe and Donald G. Haslam for Defendant and Appellant.

Gassner & Gassner, Beverly Jean Gassner and Michael J. Gassner for Plaintiff and Respondent.

FACTS AND PROCEDURAL HISTORY

H.H., who was stationed with the Navy in California, was murdered, leaving two minor children, A.E.H. and N.H. The Santa Clara County juvenile court placed the children into protective custody. Based on the premise that the fathers of the children were unknown and, therefore, there was no one to exercise parental control over them, the court released the children to the physical cus-

tody of their maternal uncle. The uncle returned to Wisconsin with the children and placed them with their maternal aunt, J.H.,[1] and her husband, P.C. Within a few weeks, the aunt and uncle filed a petition for guardianship with the Wisconsin court which gave them temporary custody of the children.

Meanwhile, in California, A.E.H.'s father, C.C., discovered several weeks after H.H.'s death the events which lead to A.E.H.'s removal to Wisconsin. C.C. then filed a petition in San Bernardino County, where he lives, to establish his paternity and to gain custody of A.E.H. C.C. filed his petition two weeks after the Wisconsin court granted temporary custody to the maternal aunt and uncle. In his petition C.C. asserted that, although he and H.H. were not married, C.C. acknowledged that he was A.E.H.'s father. C.C. is named as A.E.H.'s father on her birth certificate. He also asserted that he visited H.H. and A.E.H. frequently and acted as a father to A.E.H.

The Wisconsin and California courts communicated concerning jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) (Civ. Code, § 1550 et seq.) The California court determined that it had jurisdiction pursuant to the UCCJA and that Wisconsin did not have jurisdiction so that there was no need to defer to Wisconsin's prior custody order. Wisconsin then determined that it had jurisdiction based on the UCCJA and that California had relinquished jurisdiction when the Santa Clara juvenile court released the children to their maternal relatives. The maternal aunt appeals the California court's decision to exercise jurisdiction.

DISCUSSION

The issues as stated by the aunt in her opening brief are: Wisconsin is the more appropriate forum to deter-

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[1] The official designation for this case lists Ms. J.H. as J.H.; however, the record reflects that her name is J.H.

mine custody; California should defer to Wisconsin's prior assertion of jurisdiction; and California should not assert jurisdiction on the basis that the maternal relatives engaged in misconduct. A closer perusal of these issues reveals that the aunt is asserting that the trial court erred in determining that Wisconsin does not have UCCJA jurisdiction. Her arguments are based on the assumption that California and Wisconsin have concurrent jurisdiction. She asserts that California should defer to Wisconsin's jurisdiction because California is an inconvenient forum (Civ. Code, § 5156)[2] and because Wisconsin was the first state to exercise jurisdiction (Civ. Code, § 5155).[3] The aunt's argument concerning her possible misconduct (Civ. Code, § 5157)[4] was either based on her misperception that the trial court relied on it in its determination[5], or she discussed it in anticipation of CC's

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[2] "A court which has jurisdiction under this title to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum." (Civ. Code, § 5156, subd. (1).) This section requires that another state have UCCJA jurisdiction before it is applicable. (Civ. Code, § 5156, subd. (3).)

[3] "A court of this state shall not exercise its jurisdiction under this title if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this title, . . ." (Civ Code, § 5155, subd. (1). This section also requires that the other state have UCCJA jurisdiction before this state defers to its prior exercise of jurisdiction.

[4] "If a petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances." (Civ. Code, § 5157, subd. (1).) This section is limited to situations where two states have concurrent jurisdiction. (*In re Marriage of Fox* (1986) (180 Cal.App.3d 862, 874.)

[5] While one of the court's findings was that the maternal relatives fraudulently represented to the Santa Clara juvenile court that

argument on the subject. Neither of these events occurred, so we do not address that issue. We do address the determination that Wisconsin had no jurisdiction under the U.C.C.J.A.

The trial court's determination that Wisconsin did not have jurisdiction is subject to a substantial evidence standard of review. (*Fox, supra,* 180 Cal.App.3d at p. 869.) "Since an adjudication under U.C.C.J.A. requires subject-matter jurisdiction, the Court of Appeal is not bound by the trial court's findings and may independently reweigh the jurisdictional facts." (*Id.*, at p. 870.)

Both Wisconsin and California have adopted the UCCJA. (Civ. Code, § 5150 et seq.; Wis. Stat. §§ 822.01-822.25.) A court has jurisdiction to make a child custody determination if: it is the home state[6] of the child at the time of the commencement of the proceeding or was the home state within six months of the proceeding but the child was removed from the state by someone claiming custody; or, the child and at least one contestant have a significant connection with the state and there is substantial evidence about the child's present or future care, protection, training and personal relationships available in the state; or, the child is present in the state and has been abandoned or an emergency exists; or, no other state has jurisdiction and it is in the child's best interests for the court to assume jurisdiction. (Civ. Code, § 5152; Wis. Stat., § 822.03.)

A.E.H.'s father was unknown, it did not rely on this factor in its determination to exercise jurisdiction. The court determined that Wisconsin had no UCCJA jurisdiction. The unclean hands doctrine of Civil Code section 5157 only applies where two or more states have concurrent jurisdiction. Therefore, the court did not rely on this core section.

[6] "'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, . . ." (Civ. Code, § 5151, subd. (5); accord, Wis. Stat., § 822.02, subd. (5).)

Wisconsin was not A.E.H.'s home state. She had only been in Wisconsin a few weeks before the Wisconsin petition was filed. The date of the filing of the petition is the date the action is commenced for UCCJA purposes. (*Plas* v. *Superior Court* (1984) 155 Cal.App.3d 1008, 1015, fn. 5.) A.E.H. was not in Wisconsin at least six consecutive months before the petition was filed.

Next we determine whether A.E.H. had significant connections with Wisconsin. " 'Short-term presence in the state is not enough [to establish a significant connection with the state] even though there may be an intent to stay longer, perhaps an intent to establish a technical "domicile" for divorce or other purposes. [¶] [This section] perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in [§ 5150].[7] The para-

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[7] "(1) The general purposes of this title are to:

"(a) Avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

"(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.

"(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

"(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

"(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

"(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

"(g) Facilitate the enforcement of custody decrees of other states.

"(h) Promote and expand the exchange of information and other

graph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, prehaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state.' (Italics in original; 9 West's U.Laws Ann., *supra*, Comrs. Note to § 3, at p. 124.)" (*Plas, supra*, 155 Cal.App.3d at p. 1016, fn. added.)

A comparison with the contacts of another state reveals whether those contacts are maximum or minimum. (*Id.*, at p. 1017; *In re Marriage of Ben-Yehoshua* (1979) 91 Cal.App.3d 259, 266-267.) The child was in Wisconsin only a few weeks at the time the petition was filed. Her short-term presence was not enough to establish a significant connection though A.E.H. had visited her material relatives in Wisconsin on occasions. A.E.H.'s main concern with the state is the presence of her maternial relatives who have significant contacts with the state. A.E.H. herself does not have the required contacts. A.E.H. spent most of her life in California with her mother. She was born here and her relationship with her parents developed in California. Her father and paternal relatives live in California. Information on

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forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

"(i) To make uniform the law of those states which enact it.

"(2) This title shall be construed to promote the general purposes stated in this section." (Civ. Code, § 5150; accord Wis. Stat., § 822.01.)

A.E.H.'s future care may be available in either state depending on who receives custody of A.E.H. When the contacts are compared, A.E.H. only has minimum contacts with Wisconsin. This section is not to be construed liberally and stretched to give Wisconsin jurisdiction. (*Plas, supra*, 155 Cal.App.3d at p. 1016.)

Next we determine if Wisconsin could assume jurisdiction under the emergency paragraph. "Under the UCCJA, the emergency concept is a narrow exception to home state jurisdiction, applying only in cases of genuine immediate, substantial, threatened physical harm to the child." (*Hafer* v. *Superior Court* (1981) 126 Cal.App.3d 856, 865, 867, fn. omitted.) A.E.H. was not abandoned at the time the Wisconsin petition was filed because the Santa Clara juvenile court had placed her and her brother in protective custody and then released them to the physical custody of maternal relatives. There were adults exercising care and control of her. There was also no imminent abuse, neglect or physical harm for this same reason. There was no abandonment or emergency at the time the petition was filed which would have allowed Wisconsin to assume jurisdiction.

California has jurisdiction as A.E.H.'s home state because she lived with her mother in California for at least six consecutive months before her maternal relatives removed her. The Santa Clara juvenile Court clarified that California did not relinquish its jurisdiction to Wisconsin when the Santa Clara juvenile court gave physical custody to the maternal relatives. Therefore, Wisconsin may not exercise jurisdiction on the basis that no other state would have jurisdiction or that California had declined jurisdiction.

Wisconsin was not exercising jurisdiction in conformity with the UCCJA under any of the listed grounds. There was substantial evidence to support the trial court's determination that Wisconsin did not have UCCJA jurisdiction. Since there was no valid jurisdiction, Cailfornia

did not have to defer to Wisconsin nor do the inconvenient forum provisions apply.

The parties discuss the Federal Parental Kidnapping Prevention Act (FPKPA) (28 U.S.C. § 1738A)[8]. The FPKPA determines whether a state must give full faith

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[8] "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

" . . . .

"(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

"(1) such court has jurisdiction under the law of such State; and

"(2) one of the follows conditions is met:

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

"(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

"(E) the court has continuing jurisdiction pursuant to subsection (d) of this section." (28 U.S.C. § 1738A).

and credit to another state's custody determination. (*Thompson* v. *Thompson* (1988) —— U.S. —— [98 L.Ed.2d 512, 108 S.Ct. 513, 514]; *Kumar* v. *Superior Court* (1982) 32 Cal.3d 689, 701.) Since Wisconsin did not have jurisdiction under its own laws (UCCJA) then California was not required by the FPKPA to give full faith and credit to Wisconsin's custody determination.

DISPOSITION

Judgment affirmed.

NOT FOR PUBLICATION

/s/ Dabney J.

We concur

/s/ Campbell P.J.

/s/ McDaniel J.

APPENDIX C

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

E005242 (Super. Ct. No. OCV 38045)

C.C.,
Plaintiff and Respondent,

v.

ESTATE OF H.H. *et al.*,
Defendants and Appellants.

OPINION

[Filed Sept. 11, 1989]

APPEAL from the Superior Court of San Bernardino County. Dennis G. Cole, Judge. Affirmed.

Covington & Crowe, Donald G. Haslam and Patricia A. Teunisse for Defendants and Appellants.

Gassner & Gassner, Beverly Jean Gassner and Michael J. Gassner for Plaintiff and Respondent.

PROCEDURAL HISTORY AND FACTS

This is a child custody action between the father, C.C. and the maternal aunt and uncle, J.H. and P.C. for the custody of A.E.H. The trial court awarded custody of A.E.H., born August 1983, to her father. The court incorporated into its judgment the order of a Wisconsin court which found that C.O. is the natural father of A.E.H., that he did not fail to establish a substantial parental relationship with A.E.H. and that he did not

have the opportunity to establish a parental relationship with her. The trial court found that there was not clear and convincing evidence that an award of parental custody would be detrimental to A.E.H. and that a nonparent custodian was not necessary to serve A.E.H.'s best interests. The court ordered C.C. to enroll A.E.H. with a child psychologist and to maintain a significant, continuing relationship with A.E.H.'s aunt, uncle and brother in Wisconsin.

A.E.H.'s mother, H.H., was murdered leaving two minor children, A.E.H. and her brother N.H. The Santa Clara County Juvenile Court placed the children into protective custody. The court released the children to the physical custody of their maternal uncle since the fathers of the children were unknown to the court at that time. The uncle returned to Wisconsin with the children and placed them with respondents, their maternal aunt and uncle. Within a few weeks, the aunt and uncle had petitioned for guardianship with the Wisconsin court which gave them temporary custody of the children.

Meanwhile, in California, C.C. discovered two weeks after H.H.'s death the events leading to A.E.H.'s removal to Wisconsin. C.C. then filed a petition in San Bernardino County, where he lives, to establish his paternity and gain custody of A.E.H. C.C. filed his petition two weeks after the Wisconsin court granted temporary custody to the maternal aunt and uncle.

This court determined that California properly exercised jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) (Civ. Code, § 5150 et seq.) and that Wisconsin did not have jurisdiction. The Wisconsin court then ruled that California is the home state of the minor and has jurisdiction of A.E.H. and dismissed the Wisconsin action. The Wisconsin Court of Appeal affirmed that judgment. The Wisconsin Supreme Court issued a stay of enforcement of that judgment.

At the California hearing to determine permanent custody of A.E.H., C.C. produced depositions and testimony which revealed that C.C. intended to include A.E.H. in his extended family, that he intended to maintain contact between A.E.H. and her relatives in Wisconsin, that he had a bedroom set up for A.E.H. in his three bedroom condominium, and that he had plans for child care for A.E.H. when he is at work. C.C. testified that he offered child support to H.H. when she was alive; however, H.H. usually refused. She also refused C.C.'s offer to marry. In the six months prior to H.H.'s death, C.C. visited A.E.H. about twice per month, plus he spent his vacation with her. Before that period, A.E.H. had lived with her maternal grandfather for a year while H.H. was at sea with the Navy. C.C. had no contact with A.E.H. during this period because he did not have the grand- father's address or phone number. When A.E.H. was an infant, C.C. visited her approximately once a month after he returned to California Since A.E.H. has been in Wisconsin, C.C. has called her weekly; the aunt and uncle allowed him to visit her once; and he has sent gifts and letters. A.E.H. recognizes him and knows that he is her father.

The aunt and uncle attempted to introduce the deposition of the child psychologist who has been treating A.E.H. in Wisconsin. The court refused to admit it into evidence because of improper notice, and noted its concerns that C.C. was not allowed proper cross-examination since the deposition was taken for a court proceeding in Wisconsin. The only other evidence that the aunt and uncle introduced was the testimony of clinical psychologist Dr. Geffen. Dr. Geffen admitted that he had not met or examined any of the parties or A.E.H. and testified generally based on hypothetical questions. Neither the maternal aunt or uncle was present nor did they testify.

DISCUSSION

I

First, the aunt and uncle argue that the court improperly excluded the deposition of Dr. Eismann, A.E.H.'s psychologist in Wisconsin. Dr. Eismann was deposed in Wisconsin for a Wisconsin court proceeding. The aunt and uncle wanted to introduce this deposition as evidence in this trial. The court refused based on Code of Civil Procedure section 2025, subdivision (u) (4) and section 2025, subdivision (1) (2) (I) because improper notice was given of their intent to use this videotaped deposition. The court also expressed concern that there was lack of proper cross-examination.

A party may use a videotaped deposition of a testing physician or an expert witness even though that witness is available to testify if the deposition notice reserved the right to use the deposition at trial and if the party notified the court and all parties in writing of their intent to use the deposition in sufficient time for objections to be made and ruled on. (Code Civ. Proc., § 2025, subds. (u) (4) and (1) (2) (I).) There was no such notice; therefore, the court properly ruled the videotape of the deposition inadmissible.

In addition, the deposition transcript is not admissible under Code of Civil Procedure section 2025, subdivision (u) (7).[1] This subdivision provides that when a deposition has been taken in an action in any state it may be used in another action involving the same subject matter and the same parties as permitted by the Evidence Code. Under Evidence Code section 1291, former testimony is admissible if the party against whom it is offered had "the

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[1] Respondent contended at oral argument that appellants attempted to introduce only a videotape of the deposition and not the deposition transcript. However, that fact is not clear from the record since the attorneys and Dr. Geffen mentioned reading the transcript of the deposition.

right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." There was no showing of the nature of the proceeding in Wisconsin, what legal standard and laws were applicable in that proceeding, and what the issues were. The aunt and uncle admitted that issues different from those in the present case were adjudicated there. It is unclear whether there was notice of that deposition and opportunity to cross-examine the witness. It was the appellants' duty to produce this information to qualify the deposition as admissible. (Evid. Code, §§ 400-405.) They failed to produce this information; therefore, the court did not err in ruling it inadmissible.

The deposition was also not admissible as a basis for Dr. Geffen's testimony since he stated that he was not basing his opinions on that deposition.

II

The aunt and uncle contend that the court erred in its custody determination because there was substantial evidence that a custody award to C.C. would be detrimental to A.E.H. "Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child." (Civil Code, § 4600, subd. (c).) This section indicates a preference for parental custody. The evidence indicating detriment must be clear and convincing.[2] (*In re B.G.* (1974) 11 Cal.3d 679,

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[2] Appellants argued, for the first time at oral argument, that the "preponderance of the evidence" standard applies. We disagree. "[T]he trial court correctly applied the 'clear and convincing' standard of proof necessary to protect the fundamental rights of parents in *all cases* involving a nonparent's bid for custody. [Citations.]" (*Phillip B., supra,* 139 Cal.App.3d at 6. 421, emphasis added.)

698-699; *Guardianship of Phillip B.* (1983) 139 Cal.App. 3d 407, 421.)

There was no clear and convincing proof of detriment from an award of custody to C.C. A.E.H. had been living with her aunt and uncle for a year and a half and had physically visited with her father only once in that time. She had moved seven times throughout her life. Dr. Geffen was the only witness for the aunt and uncle. He had not interviewed or evaluated A.E.H. or any of the parties and was able to testify only in general terms based on hypothetical questions matching the facts of this case. On cross-examination, Dr. Geffen admitted that he would need to evaluate A.E.H. and the parties to make a recommendation in this case. He testified that, hypothetically, a girl in A.E.H.'s position would suffer detriment from being moved to another home environment now after her mother's death, because of frequent past moves and because of separation from her brother, aunt and uncle. However, he did not know whether A.E.H., as an individual, would adjust well to living with her father. There was no other evidence of detriment resulting from a parental custody award.

The court, as trier-of-fact, was entitled to weigh the evidence as it felt appropriate. (*Horn* v. *Oh* (1983) 147 Cal.App.3d 1094, 1099.) The court clearly gave less weight to Dr. Geffen's testimony because he did not perform evaluations on the parties. The court did not abuse its discretion in finding that there was no clear and convincing proof of detriment resulting from an award of parental custody.

III

C.C.'s renewed motions to dismiss, for attorneys fees and for sanctions are denied.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

/s/ Dabney J.

We concur:

/s/ Campbell P.J.

/s/ Hollenhorst J.

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Fourth Appellate District, Division Two, No. E005242
S012579

C.C.,

Respondent

v.

J.C.,

Appellant

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed Dec. 6, 1989]

IN BANK

Appellant's petition for review DENIED.

LUCAS
Chief Judge

APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

Case No. OCV 38045

C.C.,

Plaintiff,

v.

ESTATE OF H.H., *et al.*,

Defendants.

JUDGMENT RE PATERNITY, CUSTODY AND VISITATION

[Filed Jan. 4, 1988]

The above entitled action having come on regularly for Hearing on October 27, 1987, in Department 7 of this Court, the Honorable DENNIS G. COLE, Judge, presiding, and Plaintiff, C.C. present, and his attorney BEVERLY JEAN GASSNER of GASSNER & GASSNER, generally appearing, and DONALD G. HASLAM of COVINGTON & CROWE generally appearing on behalf of Defendants, not present, and evidence being presented and heard,

IT IS HEREBY ORDERED as follows:

I

1. Pursuant to prior stipulation of counsel and the parties, the verdict reached in the Wisconsin action, Case No. 86 TP 71, on May 16, 1987, the Honorable PATRICK J. RUDE, Judge, presiding, is made the Order of this Court:

"We, the jury, duly impaneled and sworn to try the issues in the above entitled action, do hereby make answers to the questions propounded by the Court as follows:

QUESTIONS NO. 1: Did C.C. fail to establish substantial parental relationship with A.E.H. prior to his adjudication as her father on May 15, 1987?

ANSWER: No.

QUESTION NO. 2: Did C.C. have the opportunity to establish parental relationship with A.E.H. prior to his adjudication as her father on May 15, 1987?

ANSWER: No."

C.C. is the natural father of A.E.H., born August 2, 1983.

II.

The Court is not satisfied that a non-parent custodian is required to serve the child's best interests. And the Court is further not convinced by clear and convincing evidence that parental custody would be a detriment to the child.

IT IS THEREFORE, FURTHER ORDERED that:

2. Custody of the minor child, A.E.H., born August 2, 1983, is awarded to the father, C.C., as sole custody.

3. Upon the child's return to the State of California, the father, C.C. will immediately enroll the child with a certified child psychologist. The child psychologist is ordered to work with the father and A.E.H. to develop a continuing and significant relationship with A.E.H.'s brother, aunt, uncle and the Wisconsin relatives.

4. If the parties are unable to work out a significant, continuing relationship involving significant periods of time with the family in the Wisconsin area, then, upon ten days notice, this Court will calendar the matter for

the Court to work out a visitation plan with the defendants in this matter.

Approved as to form
and content:

COVINGTON & CROWE

By: /s/ Donald G. Haslam
DONALD G. HASLAM
Attorneys for Defendants

Dated: Jan. 04 1988

DENNIS G. COLE
Judge of the Superior Court

[SEAL]

APPENDIX F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

No. 90565 & 90566

IN THE MATTER OF THE WARDSHIP OF A.E.H. AND N.H.

ORDER, JUDGMENT & DECREE RE: JURISDICTION

[Filed Sept. 9, 1986]

1.0 STATUS

1.1 A NOTICE OF MOTION (Family Law) was regularly served P.C. and J.H. to appear before the above entitled court. The said matter was heard on 03 Sep 1986 before the Honorable Leonard P. Edwards.

1.2 C.C. was not present in court, but was represented by William M. Hilton, CFLS.

1.3 P.C. and J.H. were not present in court, but were represented by Elizabeth Goodley, Esq., specially appearing.

1.4 The matter was submitted on its pleadings, together with argument by counsel for both parties.

2.0 FINDINGS AND ORDERS

2.1 The decision of this court on 25-26 Feb 1986 was a "custody determination" within the meaning of 28 U.S.C. 1738A(b)(3).

2.2 This court, on 25-26 Feb 1986 did not decline its jurisdiction to Wisconsin.

2.3 The motion of C.C. to declare the orders of 25-26 Feb 1986 void is denied.

2.3.1 A.E.H. (02 Aug 1983) and N.H. (24 Mar 1982) were released to appropriate parties at the 25-26 Feb 1986 hearing.

2.4 The above matter is no longer pending before this court as the petition filed on 25 Feb 1986 has been dismissed.

3.0 APPROVAL

3.1 Approved as conforming to the pronouncement of the court.

/s/ William M. Hilton
WILLIAM M. HILTON, CFLS
Attorney for C.C.

/s/ Elizabeth Goodley
ELIZABETH GOODLEY, ESQ.
Attorney for P.C. & J.H.

4.0 ORDER, JUDGMENT AND DECREE

4.1 The Court has read the above order, finds that it conforms with the pronouncement of the Court on 03 Sep 1986 and hereby ORDERS, ADJUDGES AND DECREES that the parties are to carry out each and every one of its terms.

Dated: 9-8-86

/s/ Leonard P. Edwards
HON. LEONARD P. EDWARDS
Judge of the Superior Court
State of California

APPENDIX G

Office of the Clerk

SUPREME COURT
231 E. State Capitol
P.O. Box 1688
Madison, Wisconsin 53701-1688

Telephone 608-266-1880

June 4, 1991

To: LINDA S. BALISLE
MICHAEL S. HEFFERNAN
LEE C. ERLANDSON
MICHAEL R. FITZPATRICK
DANIEL T. DILLON

You are hereby notified that the Court has entered the following order:

#88-2022 IN THE INTEREST OF A.E.H., A PERSON UNDER THE AGE OF 18: P.C. & J.H. v. C.C.

THE COURT HAVING CONSIDERED THE MOTION FOR RECONSIDERATION AND THE MOTION TO PRESERVE THE ELECTRONIC RECORDING OF ORAL ARGUMENT FILED BY THE RESPONDENT-CROSS APPELLANT,

IT IS ORDERED THAT THE MOTION FOR RECONSIDERATION IS DENIED, WITH $50.00 COSTS. IT IS FURTHER ORDERED THAT THE MOTION TO PRESERVE THE ELECTRONIC RECORDING OF ORAL AGUMENT IS GRANTED.

Chief Justice Heffernan did not participate.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX H

STATE OF WISCONSIN
CIRCUIT COURT
ROCK COUNTY

#86-6N-34

IN THE MATTER OF THE GUARDIANSHIP OF N.J.H. AND A.E.H., Persons Under the Age of 18

TRANSCRIPT OF PROCEEDINGS
TELEPHONE CONFERENCE CALL
WITH CALIFORNIA

DATE:

June 17, 1986—Rock County Courthouse, Br. 2
Janesville, Wisconsin 53545

BEFORE:

Hon. JOHN H. LUSSOW, Judge

APPEARANCES:

MEALY & KELLY by RICHARD KELLY, Attorney appearing in behalf of the petitioners; P.C. and J.H., Petitioners, in person;

NOWLAN and MOUAT by DANIEL DILLON, Attorney appointed as Guardian ad Litem for the minors; BRENNAN, STEIL, RYAN, BASTING & MACDOUGALL, S.C. by JAMES WELKER, Attorney appearing specially in behalf of C.C.;

(via the phone:)

FRANK O. TETLEY, Commissioner, Ontario, CA; BEVERLY GASSNER, Attorney appearing specially in behalf of the putative father; C.C., Putative father, in person; ELIZABETH GOODLEY, Attorney appearing specially in behalf of the defendants.

COURT REPORTER:

Donna Nell
Registered Professional Reporter

* * * *

But I think that this court does meet the criteria for assuming jurisdiction over the custody issue at this point. And you may feel the same way. And maybe we're both going to—both courts are going to assume jurisdiction and these people are going to have to take it on from here, but I think we have got to get this decision made and—

JUDGE TETLEY: I agree. I agree entirely.

One last thought before you make whatever findings you are willing to make at this time and likewise myself.

If, as you say, the father here—or, rather, the plaintiff here, will likely be found to be the father—and I agree that maybe let's assume that for the moment—I think that even in humanitarian terms the equities now then would be that if Wisconsin maintains jurisdiction, one year from now or eight months from now after the blood tests have been done, if that's possible to conclude without the mother's blood being available, for whatever other evidentiary hearing is completed, he is deemed to be the father, then the father, so far as I know, argument back there does not place a nonparent and a parent on an equal basis.

It's the rule in California, and it may well be the rule in Wisconsin, that then the relative there of the mother will have to show the father to be, in essence, unfit or at least it would be to the detriment of the child to be placed with him.

That would be the finding. If you couldn't make that finding—I don't know whether you could—then the children are now going to be uprooted and torn away from that environment back there.

And I know it's—just for thinking out loud here in terms of the tragedy that it appears to be headed toward the people in front of you, even if they succeed now in keeping the children with them, it appears to me at

least that if the children, within the next year, will ultimately have to pay that price.

I'm sure that's not determinative in your thinking, but maybe you have some final thought before I—

THE COURT: Well, I guess the other side of the coin there is we do have the other child who—and C.C. is not the putative father of that child.

And one other factor, which may ultimately have some bearing, is the fact that the mother left a will designating these people to be guardians. I can't understand why she would do that in lieu of C.C. if—if she felt strongly that he should have the children.

Anyway, we are dealing with two children with different fathers. And this—this again complicates the matter further.

JUDGE TETLEY: Did you wish to make any findings or order at this time?

THE COURT: Well, I think I'm prepared to—to find that, insofar as the proceeding were concerned with in Santa Clara County, and in talking with Judge Edwards, that was an emergency situation, that the court acted on the information that it had, that the children were released to the aunt and uncle under the color of a temporary order and was told to bring those children back to Wisconsin and commence a custody action.

They did that. That action was commenced in April. At some period subsequent to that, the name of the putative father was discovered, and he was given notice of these proceedings.

I further believe that, under Section 822.06, which is our statute, that this court can exercise jurisdiction over the children. And that, based upon the recommendation of the Guardian ad Litem and in looking at the various factors, that the court should consider, in assuming subject matter jurisdiction, that those criteria under 822.03(1)(b) and (c) are met, and that it's in the best interests of the children that the Wisconsin court take jurisdiction of the matter.

So—so that's my decision, Judge, and I will let you make your decision.

JUDGE TETLEY: You said children. For the record here, honestly there is also here a different guardianship action regarding the other child.

For the purposes of this hearing then I will also address both of the children as well. Maybe it will save the parties some appeal costs.

I respect the opinion of and finding and orders that you just made, but I also have to find, unfortunately, that—that California does have jurisdiction over the issues of custody of the minor child, A.E.H. and as well as N.J.H., as we're dealing with him at the same time.

Regarding those children, I will make the following specific finding. For the convenience of the parties, I will talk slowly.

Found—I now find California to be the home state of the minor versus the fact she lived here with her mother—her father is here as well—in California for at least six months prior to the filing of this action.

The minor is currently absent from California by the releasing to the maternal extended family, an uncle, possession custody of the minor through Santa Clara juvenile court.

Regarding Santa Clara, for the moment, I can't make a finding that they didn't have jurisdiction totally, but I have some grave reservation about the notice that was given—rather, the lack of notice that was given to the plaintiff here in front of me prior to the release of the child. The plaintiff here is on the birth certificate. He has lived and at all times continues to live in California. I can't find that any other state would have jurisdiction pursuant to the home state doctrine.

It seems to me, further, that, regarding the significant contact argument was made the minor child and the plaintiff both here have in California significant connection with California. This goes beyond the mere physical presence of merely residing within the jurisdiction.

There seems to be available in California substantial evidence regarding the child's past care, protection, training, the personal relationship, etcetera.

Further make a finding that this paternity action is a form of a custody case, and it's governed by the Uniform Child Custody Jurisdiction Act.

I believe we agree that both California and Wisconsin have adopted the Uniform Child Custody Jurisdiction Act, and I know that we are bound by its terms.

I cannot find that the action of the Santa Clara juvenile court was in any way res judicata against the paternity action filed here in San Bernardino County. I think that due process was not accomplished, completed with the plaintiff regarding the action up north.

Unfortunately, for both of the children, I will have to make those findings, unfortunately, for them in the sense that I think personally there may be some additional hardship to them down the road.

But legally I don't think I have much of a—of a choice based on the information I have in front of me at this time.

So counsel in front of you, your Honor, request any further specific findings or orders of me, and I will ask the same question here of Ms. Gassner.

THE COURT: All right. Counsel, do you have anything further?

Nothing further here, Commissioner.

JUDGE TETLEY: Okay. Let me see, okay. I have been handed a finding, and I read it over. I think that I do need to, for the purposes—you may well also want to consider such a finding regarding the appellate process. I'll make the order here now, that Wisconsin may not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in California where such court of that other state is exercising jurisdiction consistent with the provisions of 28 U.S.C.A. 1738 to make a custody determination.

MR. KELLY: Your Honor, that's the same finding and order that I submitted to you with my—my memorandum.

APPENDIX I

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH VI
ROCK COUNTY

Case No. 86-TP-71

IN THE INTEREST OF: A.E.H.
a person under the age of 18

BRIEF IN SUPPORT OF MOTION TO DISMISS

This is a child custody action in which the father of the minor child, C.C. (hereinafter, C.C.), requests that this court determine that: (1) the State of California has jurisdiction to decide issues regarding the custody of his daughter, A.E.H. (hereinafter, C.C.); and (2) the issues of the best interests of A.E.H. and the proper custodian for A.E.H. are res judicata as those issues were recently litigated in the California state courts. This brief is submitted in support of C.C.'s motion.

FACTS

The following facts are material to this motion. A.E.H. was born to C.C. and H.H. in California on August 2, 1983. A.E.H. resided with her mother in Santa Clara County, California from her birth until May, 1984. From May, 1984 through May, 1985, A.E.H. resided with her grandfather in Missouri. A.E.H. resided in California with her mother from May, 1985 until February 23, 1986. C.C. has resided in California since before A.E.H.'s birth to the present.

On February 23, 1986, H.H. died and A.E.H. was taken into emergency placement by the California juvenile au-

thorities. On or about February 25, 1986, H.H.'s relatives (including J.H. and P.C.) arrived in California to seek temporary custody of A.E.H., J.H. and P.C. informed the Santa Clara County juvenile authorities, and the Santa Clara County Juvenile Court authorities believed, that the father of A.E.H. was unknown. Based on those representations, A.E.H. was released into the custody of J.H. and P.C.. C.C. received no notice of A.E.H.'s removal from California until several weeks later. (See Exhibits A, attached).

J.H. and P.C. then returned to Wisconsin with A.E.H.. A.E.H. has resided in Wisconsin since February 26, 1986. In mid-March, 1986 J.H. and P.C. petitioned for, and were awarded, the temporary guardianship of A.E.H. in the Wisconsin Circuit Court for Rock County. On April 1, 1986, C.C. commenced an action in the Superior Court for the State of California, County of San Bernardino, requesting that he be awarded custody of A.E.H. After several months of hearings in California and Wisconsin, and after conference calls between the courts of Wisconsin and California, both courts issued rulings on June 17, 1986.

On that date, the California court determined, among other things, that: (a) the Santa Clara County Juvenile Court had released A.E.H. to J.H. and P.C. under false and/or fraudulent representations of the maternal relatives; (b) only the State of California has jurisdiction over A.E.H. pursuant to California law and 28 U.S.C. § 1738A; (c) the decision of the Juvenile Court of Santa Clara County did not decline jurisdiction over A.E.H. to Wisconsin.[1]; (d) pursuant to 28 U.S.C. § 1738A(g), Wis-

[1] In an order dated September 8, 1986, the Superior Court of California, County of Santa Clara, found that, in placing A.E.H. with the defendants on February 26, 1986, the Superior Court for Santa Clara County did not decline its jurisdiction to Wisconsin. The court, in its September 8, 1986 order, also found that the Santa Clara County action that released A.E.H. to J.H. and P.C. was no longer pending and had been dismissed. (See Exhibit B, attached).

consin should not assume jurisdiction over A.E.H.; and (e) temporary custody of A.E.H. shall be awarded to C.C. (See Exhibit C, attached).

Shortly thereafter, J.H. and P.C. moved to adopt A.E.H. and terminate the parental rights of C.C. A trial on those issues was held in mid-May, 1987. The jury found that C.C. is the father of A.E.H. The jury further found that there were no factual grounds for the termination of C.C.'s parental rights. At all times, C.C. has appeared specially in this action and objected to jurisdiction of the Wisconsin courts.

At approximately the same time, C.C. requested that the Superior Court of California for the county of San Bernardino find that: (a) C.C. is the father of A.E.H.; and (b) A.E.H. should be placed in his permanent custody. *C.C. vs. Estate of H.H., et al.*, Superior Court of California, County of San Bernardino, Case No. OCV-38045, Honorable Dennis G. Cole presiding. At all times in the California action, J.H. and P.C. made a general appearance and did not object to the jurisdiction of the California court. The California court, in a judgment dated January 4, 1988, found that C.C. is A.E.H.'s father and custody of A.E.H. should be with C.C. (See Exhibit D, attached). In subsection II of that judgment, Judge Cole determined that: "The Court is not satisfied that a non-parent custodian is required to serve the child's best interest. And the Court is further not convinced by clear and convincing evidence that parental custody would be a detriment to the child."

ARGUMENT

I. *Jurisdiction*

Jurisdiction over the issue of custody of A.E.H. should be in the California state courts because: (a) California is the only state which satisfies the requirements of 28 U.S.C. § 1738A; and (b) P.C. and J.H. have voluntarily

submitted to the jurisdiction of the California courts on this issue.

28 U.S.C. § 1738A was passed by Congress to give courts guidelines for determining which state has jurisdiction in interstate child custody disputes. In *Thompson vs. Thompson*, —— U.S. ——, 108 S. Ct. 513, 98 L. Ed. 2d 512, 56 U.S.L.W. 4055, 4058 (1988), the United States Supreme Court held that there is no cause of action in the federal courts under that statute. Rather, that law is a ". . . mandate to state courts to respect the custody decrees of sister states." *Thompson*, 56 U.S.L.W. at 4058. Of course, state courts are bound by § 1738A under the supremacy clause of the United States Constitution. Only one state may properly assert jurisdiction over the custody of a child under 28 U.S.C. § 1738A. *Flood v. Braaten*, 727 F.2d 303, 310 (3rd Cir., 1984). Therefore, it must be determined whether California or Wisconsin may properly assert jurisdiction.

The relevant portion of 1738A states:

> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—
>
> (1) Such court has jurisdiction under the law of such state; *and*
>
> (2) Any one of the following conditions is met:
>
> (A) Such state . . . (ii) had been the child's home state within six months before the date of the commencement of the proceeding *and* the child is absent from such state because of his removal or retention by a contestant or for other reasons, *and* a contestant continues to live in such state; . . . (Emphasis added.)

Under the above-quoted section, the state courts of California have jurisdiction over the issue of custody of A.E.H. as: (1) The courts of California have jurisdic-

tion over the issue under the law of the State of California; (2) California had been A.E.H.'s "home state" within six months of the date of the commencement of the California custody proceeding; (3) A.E.H. is absent from California because of her removal by a contestant—in this case, P.C. and J.H.; and (4) a contestant—in this case, C.C.—continued to reside in California.

Preliminary Definitions

A number of terms used in 28 U.S.C. § 1738A are defined in subsection (b) of the statute. There are no disputes regarding how those definitions apply to the facts of this case.

First, A.E.H. is a "child" under 28 U.S.C. § 1738A (b) (1) as she is 3 years old. Second, California and Wisconsin are "states" as that term is defined under 28 U.S.C. § 1738A(b) (8). Third, C.C. and J.H. and P.C. are "contestants" under 28 U.S.C. § 1738A(b) (2) as they are all persons (a parent and non-parents) who claim a right to custody of the child.

Fourth, under 28 U.S.C. § 1738A(b) (3), a "custody determination" is defined as:

> . . . a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications . . .

The California and Wisconsin state court orders fit that description as both are clearly orders and both provide that either C.C., or J.H. and P.C., shall have custody of A.E.H.

Fifth, the "home state" under 28 U.S.C. §1738A (b) (4) is the state in which: (a) immediately preceding the time involved; (b) the child lived with a parent; (c) for at least six consecutive months. Here, the "time involved", and the time during which these difficulties began, was the death of A.E.H.'s mother at the end of

February, 1986 and her removal from the State of California. As to the time and place of her residence, A.E.H. lived with her mother in California for approximately nine consecutive months before the time involved in this case; that is, from May, 1985 to the end of February, 1986. Therefore, California is A.E.H.'s "home state" as that term is defined in 28 U.S.C. § 1738A.

Jurisdiction Under California Law

Since there are no issues regarding the preliminary definitions, the four elements mentioned above must be analyzed. The first element is that the courts of California have jurisdiction over the issue of custody of A.E.H. under the laws of California.

Sec. 5152, California Code (Exhibit E, attached), states the grounds on which California courts may assert jurisdiction over the issue of custody of a child [2]:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:
>
> (a) This state . . ., (ii) had been the child's home state within six months before commencement of the proceeding *and* the child is absent from the state because of his removal or retention by a person claiming his custody or for other reasons, *and* a parent or person acting as parent continues to live in this state. (Emphasis added.)

So under California law, California had, and has, jurisdiction in this matter if the three elements of § 5152 (1) (a) (ii) are satisfied. Here, as we discussed above,

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[2] Sec. 5151, California Code, defines terms such as "contestant", "custody determination", and "home state" used in Sec. 5152. The definitions of those terms in the California Statute are virtually identical to the definitions of those terms in 28 U.S.C. § 1738A.

California was A.E.H.'s "home state" until the end of February, 1986. The "proceeding" in California was the action for custody of A.E.H. filed by C.C. in the California courts on April 1, 1986. So, the California proceeding [3] was commenced within six months of the time California was A.E.H.'s home state. Next, A.E.H. was removed from California and retained in Wisconsin by persons claiming custody of her; in this case, J.H. and P.C.. Finally, C.C. continues to live in California and is the father of A.E.H. Therefore, California had, and has, jurisdiction to decide issues regarding the custody of A.E.H. under its own law.

California is Home State

Next, California had been A.E.H.'s home state within six months before the commencement of the proceeding. 28 U.S.C. § 1738A(c)(2)(A)(ii). The analysis on this point of 28 U.S.C. § 1738A is identical to the analysis done under California law, above, as the definitions and facts are identical: California was A.E.H.'s home state until the end of February, 1986; and the California custody proceeding (as well as the Wisconsin custody proceeding) was commenced within six months of that date. So, the second element of 28 U.S.C. § 1738A(c) is satisfied.

Absent from California

The third element is ". . . the child is absent from such state because of his removal or retention by a contestant or for other reasons, . . ." 28 U.S.C. § 1738A (c)(2)(A)(ii). In this case, the state referred to is California. A.E.H. is absent from that state as she is now residing in Wisconsin and she was removed from California in February, 1986 by J.H. and P.C. As was

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[3] Also, the Wisconsin custody proceeding, commenced in March, 1986, was commenced within six months of the time California was the home state of A.E.H.

discussed above, J.H. and P.C. met the definition of "contestants" under 28 U.S.C. § 1738A(b)(2). Therefore, the third element of 28 U.S.C. § 1738A(c) is satisfied.

Plaintiff Resides in California

The final element is ". . . and a contestant continues to live in such state . . ." 28 U.S.C. § 1738A(c)(2)(A)(ii). The state referred to is California. C.C., as was discussed above, is a "contestant", under 28 U.S.C. § 1738A(b)(2). It is also undisputed that plaintiff continues to live in California. Therefore, the fourth and final element of 28 U.S.C. § 1738A is satisfied.

Pursuant to the undisputed facts in this action, only the courts of the State of California may properly exercise jurisdiction over the issue of custody of A.E.H. since only the custody determination of California regarding A.E.H. is consistent with 28 U.S.C. § 1738A. As was stated, at any one time the custody determination of only one state may be consistent with this statute. *Flood*, 727 F.2d at 310. So, California, and not Wisconsin, is the one state which has met those requirements.

Consent to Jurisdiction of California State Courts

In addition to the above analysis under federal law, California has jurisdiction over this action since P.C. and J.H. have consented to jurisdiction in the California courts. At each point in these proceedings in the Superior Court of California, County of San Bernardino, P.C. and J.H. have made a general appearance. There have been no objections to California's jurisdiction. That point was made clear in the California judgment signed by Judge Cole. The judgment states that the defendants (P.C. and J.H.) made a general appearance by their attorney. No objection to jurisdiction was noted and, in fact, the order was "approved as to form and content" by their attorney. (See Exhibit D, attached). That position is in stark contrast to C.C.'s stance in the Wisconsin state courts. At

each point, C.C. has objected to every proceeding in this state and stated that only California has jurisdiction.

Only one state may exercise jurisdiction over this matter. By their general appearance and consent to California jurisdiction, P.C. and J.H. have waived any right to assert that only Wisconsin has jurisdiction in this action.

II. *Res Judicata*

Second, the court should dismiss this action for custody as the custody issue is res judicata. In a letter to the court dated June 8, 1987, the guardian ad litem in this action suggested that a hearing be held to determine issues raised in *Barstad v. Frazier*, 118 Wis. 2d 549 (1984). The standard enunciated in *Barstad* is:

> We conclude that the rule to be followed in custody disputes between parents and third parties is that a parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party. Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child. If the court finds such compelling reasons, it may award custody to a third party if the best interests of the children would be promoted.

Barstad, 118 Wis. 2d at 568-569.

So, if there are any determinations to be made on merits of this case, those issues are specifically outlined in the above quote from the supreme court. However, those identical, or virtually identical, issues have already been determined in the California state court.

In *C.C. vs. Estate of H.H. et al.*, Superior Court of California, County of San Bernardino, Case No. OCV-

38045, P.C. and J.H. made a general appearance, hired a law firm to represent their interests, appeared at trial, presented evidence, and fully litigated the issues of: (1) whether a non-parent custodian is required to serve the best interests of the child; and (2) whether a parental custodian would be a detriment to A.E.H. The court decided both of those issues against P.C. and J.H. and for C.C., and awarded custody of A.E.H. to C.C. The standard in *Barstad* is whether there are ". . . compelling reasons . . . that would drastically affect the welfare of the child." While phrased slightly differently, the California issues are identical to the *Barstad* issues.

Here, only a few months ago, the same parties fully litigated, with competent counsel, the very issues now before the court in Wisconsin. P.C. and J.H. decided to make their stand in California and they lost. P.C. and J.H. should not be allowed another trial on the same issues simply because they do not like the California verdict.[4]

CONCLUSION

Wherefore, C.C. respectfully requests that the court:

(1) Decline jurisdiction in this action to the Superior Court of California, San Bernardino County;

(2) Find that the issues now before the court are res judicata;

(3) Order J.H. and P.C. to abide by and obey the January 4, 1988 judgment issued by the Honorable Dennis Cole in *C.C. vs. Estate of H.H. et al.*, Superior Court

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[4] In addition, P.C. and J.H. have already litigated the *Barstad* issues in Wisconsin. The "compelling reasons" cited by the Wisconsin Supreme Court are virtually identical to the factual grounds for termination of parental rights under Chapter 48, Wisconsin Statutes. P.C. and J.H. have alleged grounds for termination of parental rights and lost on those issues before a Wisconsin jury. A further hearing on custody under the *Barstad* standard would only rehash testimony and evidence from the May, 1987 trial.

of California, County of San Bernardino, Case No. OCV 3845; and

(4) Order such further relief as the court may deem proper.

Dated this 29th day of July, 1988.

BRENNAN, STEIL, BASTING
& MACDOUGALL, S.C.

By: /s/ Michael Fitzpatrick
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APPENDIX J

WISCONSIN COURT OF APPEALS

No. 88-2022. Submitted on briefs June 22, 1989.—
Decided August 1, 1989

IN THE INTEREST OF A.E.H., a person under the age of 18: P.C., and J.H.,
Appellants-Cross Respondents,

v.

C.C.,
Respondent-Cross-Appellant.

APPEAL from an order of the circuit court for Rock county: PATRICK J. RUDE, Judge. *Affirmed.*

For appellants-cross respondents, there were briefs by *Lee Erlandson*, of Madison.

For respondent-cross appellant, there were briefs by Michael R. Fitzpatrick of Brennan, Steil, Basting & MacDougall, S.C., of Janesville.

For the guardian ad litem there was a brief filed by *Daniel T. Dillon of Nowlan & Mouat*, of Janesville.

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. P.C. and J.H. appeal an order dismissing a custody action on the basis the court lacked subject matter jurisdiction. The issue is whether the doctrine of collateral estoppel bars the relitigation of the jurisdiction question because the circuit court earlier determined that

it had subject matter jurisdiction in a guardianship action and a termination of parental rights (TPR) action involving the same parties. We conclude that collateral estoppel does not bar relitigation, and we affirm the order of dismissal.

A.E.H. was born to C.C. and H.H. in California on August 2, 1983. The father and mother never married and did not cohabitate after the child's birth. The child resided with her mother in California from birth until May, 1984. From May, 1984, until May, 1985, she resided with her maternal grandfather and his wife in Missouri while her mother was on duty at sea with the United States Navy. During that year, the child visited relatives in Wisconsin, including J.H. and P.C., her maternal aunt and uncle.

The child resumed residence in California with her mother in May, 1985. On February 23, 1986, her mother was murdered and she was taken into the custody of the Santa Clara County, California, juvenile authorities. The child's relatives, including her aunt and uncle, sought temporary custody of her. Because the Santa Clara Juvenile Court believed that the child's father was unknown, the court placed physical custody with the aunt and uncle who returned to Wisconsin with the child. She has resided here since February 26, 1986.

On March 17, 1986, the aunt and uncle petitioned for guardianship of the child in Rock County, Wisconsin. Judge John Lussow granted them temporary guardianship. On April 1, 1986, the father filed a paternity and custody action concerning the child in San Bernardino County, California.

After a telephone conference between the California and Wisconsin trial courts, each court issued simultaneous rulings. The court in Rock County ruled that Wisconsin had subject matter jurisdiction under sec. 822.03

(1)(b), (c) and (d), Stats. (1985-86),[1] the Uniform Child Custody Jurisdiction Act (UCCJA, to make child custody determinations concerning the child. It ordered that the proceedings in California be stayed and directed that court to cease any further action concerning the child. On the other hand, the California court ruled, among other things, that California had jurisdiction over the custody of the child under sec. 822.03(1)(a) and (b)[2] of the UCCJA; that California had invoked jurisdiction in February, 1986; that California never declined juris-

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[1] Section 822.03(1) provides:

Jurisdiction. **(1)** A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state is the home of the child at the time of commencement of the proceeding, or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) The child is physically present in tihs state, and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) It appears that no other state would have jurisdiction under prerequisites substantially in acocrdance with par. (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

[2] Both California and Wisconsin have adopted the Uniform Child Custody Jurisdiction Act. The sections cited in this opinion are the Wisconsin statutes (1985-86).

diction; and that Wisconsin should not assume jurisdiction. It awarded temporary custody of the child to her father. On June 26, 1986, Rock County held a guardianship hearing where the father appeared specially, objecting to the court's subject matter jurisdiction. The court continued with the hearing and appointed the aunt and uncle permanent guardians of the child.

On November 26, 1986, the aunt and uncle filed an action in Rock County to terminate the father's parental rights. In response, the father filed a motion to dismiss the action, again arguing that Wisconsin lacked subject matter jurisdiction. Judge Patrick Rude denied the motion to dismiss, concluding that Wisconsin had jurisdiction because Judge Lussow's jurisdiction decree in the guardianship case was res judicata as to the jurisdiction issue. Judge Rude also made his own determination that Wisconsin had jurisdiction under the UCCJA because Wisconsin was the child's "home state." *See sec.* 822.03 (1) (a), Stats.

The TPR trial in Wisconsin took place on May 16, 1987. The jury found C.C. to be the father of the child and concluded that there were no grounds to terminate his parental rights. Following those proceedings, the aunt and uncle filed a custody motion in Rock County, claiming they should be awarded custody of the child even though the father's parental rights were not terminated.

The October, 1987, custody proceedings initiated by the father were held in California. The aunt and uncle participated in those proceedings through their attorney. The issue was raised as to whether California did, in fact, have "home state" jurisdiction of the child. The court found that California did have jurisdiction and that there was no reason to find that Wisconsin was in a position to assume jurisdiction. The court awarded custody of the child to her father. The aunt and uncle appealed the decision to the California Court of Appeals. That court affirmed the trial court's decision, finding that California had jurisdiction under the UCCJA.

The father filed a motion to dismiss the Rock County custody action based on California's award of custody to him. This time Judge Rude granted the motion to dismiss concluding that the California court, not the Wisconsin court, did indeed have jurisdiction over the custody of the child. Judge Rude denied the aunt and uncle's motion for reconsideration but granted their motion to stay the order of dismissal pending appeal.

The aunt and uncle argue that collateral estoppel precludes relitigation of subject matter jurisdiction under sec. 822.03 because of Judge Lussow's June 17, 1986, jurisdiction decree in the guardianship action. They also argue that res judicata [3] precludes relitigation of subject matter jurisdiction because of Judge Rude's denial of the motion to dismiss the TPR action after adopting Judge Lussow's finding of jurisdiction in the guardianship case.

Subject matter jurisdiction questions deal with whether a court has the power or competence to decide the kind of controversy involved. These are questions of law that we decide without deference to the trial court. *Dragoo v. Dragoo*, 99 Wis. 2d 42, 43, 298 N.W.2d 231, 232 (Ct. App. 1980). Subject matter jurisdiction is conferred by the constitution and statutes that grant the courts power to hear various kinds of actions. *State ex rel. Prentice v. County Court*, 70 Wis. 2d 230, 237, 234

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[3] The difference between collateral estoppel and res judicata has been detailed in *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955):

> [U]nder the doctrine of *res judicata*, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

Because both arguments involve the doctrine of collateral estoppel, we will treat them as such in this appeal.

N.W.2d 283, 286 (1975). The statutes define and limit the circuit court's jurisdiction concerning actions involving guardianship, TPR, and custody proceedings.

Subject matter jurisdiction cannot be waived or conferred by consent. *State ex rel. La Follette v. Raskin*, 30 Wis. 2d 39, 45, 139 N.W.2d 667, 670 (1966). Whenever want of jurisdiction appears at any stage of the case, it is the court's duty to dismiss the case from its consideration. However, the concept of subject matter jurisdiction must be applied in conjunction with, and in deference to the well-established principle of collateral estoppel. *H.N.T. v. State*, 125 Wis. 2d 242, 252, 371 N.W. 2d 395, 400 (Ct. App. 1985). The doctrine of collateral estoppel established that a party to a previous lawsuit may not relitigate an identical issue of fact or law that was actually adjudicated and necessarily decided in a suit in which there was a valid and final judgment.

The first question we consider is whether the UCCJA applies to guardianship and TPR proceedings. If it does not, the issue of jurisdiction under the UCCJA was not necessarily decided in those proceedings and collateral estoppel does not bar relitigation of that issue.

The UCCJA confers jurisdiction to make child custody determinations. Sec. 822.03, Stats. A custody determination is defined in part as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights." Sec. 822.02(2), Stats. Section 822.02(3) states that a custody proceeding "includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings." The UCCJA does not explicitly include or exclude guardianship or TPR proceedings from its domain, nor does Wisconsin case law expressly address this question. However, other states that have adopted the

UCCJA have ruled affirmatively as to the applicability of the Act to guardianship and TRP proceedings.[4]

The Oklahoma Supreme Court found that a guardianship proceeding with respect to a minor must comply with the UCCJA. *Walling v. Walling*, 727 P.2d 586, 590 (Okla. 1986). The court, in part, relied on the UCCJA commissioner's note stating that a custody proceeding "is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody."[5] The Ohio Supreme Court found that the UCCJA applies to a guardianship termination proceeding involving minors. *Guardianship of Wonderly*, 423 N.E.2d 420 (Ohio 1981). It supported its decision by citing Ohio's guardianship statute, which indicates that a guardian shall have custody of the person and the estate of a minor. The court concluded that "the guardianship issue and the custody issues are inextricably intertwined, thus requiring compliance with the [UCCJA]." *Id.* at 424. Wisconsin's guardianship has custody of the person of a minor.[6]

As for TPR proceedings, an Indiana appellate court found that even though a termination of parental rights

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[4] The UCCJA, as adopted in the states in this discussion, contains a definition of "custody proceeding" similar to Wisconsin's definition.

[5] UCCJA, 9 U.L.A. sec. 2 at 120, *cited in Walling*, 727 P.2d at 589.

[6] Section 880.01(3), Stats., states:

> "Guardian" means one appointed by a court to have care, custody and control of the person of a minor or an incompetent or the management of the estate of a minor, an incompetent or a spendthrift.

The relevant portion of sec. 48.023, Stats., states:

> "A person appointed by the court to be the guardian of a child under this chapter has the duty and authority . . . including but not limited to:
>
> . . . .
>
> (4) The rights and responsibilities of legal custody except when legal custody has been vested in another person.

is the ultimate determination of child custody as to that parent, jurisdiction for TPR cases does not fall under the UCCJA. *Johnson v. Capps*, 415 N.E.2d 108, 110 (Ind. Ct. App. 1981). The court reasoned that TPR is a "statutory mechanism which permits a child to be adopted without the consent of a parent," and as such, jurisdiction "is properly determined under the adoption statutes." *Id.* Many states, however, have found that adoption proceedings are custody proceedings within the meaning of the UCCJA.[7] The Georgia Supreme Court found that the language and purpose of the UCCJA are broad enough to encompass adoption proceedings. *Gainey v. Olivo*, 373 S.E.2d 4 (1988). In reaching this conclusion, the court relied in part on the fact that the drafter and reporter for the UCCJA wrote that the Act should be applied to adoption proceedings.[8] *Gainey* is relevant to the present case in that it was a proceeding to terminate the natural father's parental rights in addition to an adoption proceeding. The *Gainey* court noted that it has, in a context not involving the UCCJA, broadly defined the term "custody" to include TPR proceedings.[9]

An additional argument for including TPR proceedings in the UCCJA comes from an interpretation of the Act's language itself. Section 822.02(3) includes child neglect and dependency proceedings within the purview of "custody proceedings." In Wisconsin, these proceedings would most likely be brought as a CHIPS proceeding (child alleged to be in need of protection or services)

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[7] *See E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982); *Noga v. Noga*, 443 N.E.2d 1142 (Ill. App. 3d 1982); *Souza v. Superior Court*, 193 Cal. App. 3d 1304, 238 Cal. Rptr. 892 (1987).

[8] Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. Davis L. Rev. 229 (1979), *cited in Gainey*, 373 S.E.2d at 6.

[9] *Gainey*, 373 S.E.2d at 7 n. 6 (citing *Hancock v. Coley*, 368 S.E.2d 735 (Ga. 1988)).

under sec. 48.13, Stats.[10] In a CHIPS proceeding, if the courts finds that a child is in need of protection or services, it decides on a placement and treatment for the child. In making this decision, it must follow "a policy of transferring custody from the parent only where there is no less drastic alternative." Sec. 48.355, Stats. If a CHIPS proceeding is a custody proceeding under the UCCJA, it follows that the more drastic TPR proceeding, whereby a parent is permanently stripped of the custody of a child, is a custody proceeding under the Act.

We conclude that guardianship and TPR proceedings are "custody" determinations within the meaning of sec. 822.02(3) and therefore are governed by the UCCJA. This conclusion is consistent with the reasons and purposes for adopting the Act. These include, among others, the avoidance of jurisdictional competition and conflict with other states resulting in the shifting of children from state to state; the rendering of a custody decree in the state that can best decide the case; and the avoidance of relitigating the custody decisions of other states. *See* sec. 822.01, Stats. The UCCJA would lose much of its effectiveness if it did not cover all proceedings in which a "custody" determination could be made.

Next we decide whether the finding in the guardianship and TPR proceedings, that Wisconsin has jurisdiction under the UCCJA, collaterally estops relitigation of

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[10] The relevant portion of sec. 48.13 provides:

> The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:
>
> . . . .
>
> (2) Who has been abandoned;
>
> . . . .
>
> (10) Whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endager the physical health of the child;

that issue. Because an exception to the basic principle of collateral estoppel applies to this case, we hold that the jurisdiction issue may be relitigated.

Restatement (Second) of Judgments, sec. 12 (1982), provides:

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (2) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

It is our determination that subject matter under the UCCJA was so plainly beyond the circuit court's jurisdiction in both the guardianship and TPR proceedings that it was a manifest abuse of the circuit court's authority to entertain those actions. It is clear upon review, and should have been clear at the time of those proceedings, that California, not Wisconsin, had jurisdiction under the UCCJA to make custody determinations concerning A.E.H.

Under sec. 822.03(1), only one of the four criteria listed in subsecs. (a), (b), (c) and (d) must be met before a court can assume jurisdiction under the UCCJA.

See Colby v. Colby, 102 Wis. 2d 198, 203-04, 306 N.W.2d 57, 60 (1981. It is not contested that California, rather than Wisconsin, was the child's "home state," as defined in sec. 822.03(1)(a), at the time of the guardianship proceedings. The child had lived in California within six months prior to the guardianship proceeding, and she was absent from California because she was removed by the aunt and uncle who now seek custody.

The Rock County court's decree of jurisdiction in the guardianship action was based on its determination that Wisconsin met the criteria in subsecs. (b), (c), and (d) of sec. 822.03(1). Subsection (b) requires that the child and at least one of the contestants have significant connections with the state. The court determined that the child and the aunt and uncle had significant connections with Wisconsin based on thirty-three findings of fact. However, almost all of these findings pertain to either the admittedly significant connections of the aunt and uncle with Wisconsin or to the contacts, or lack of contacts, between the child and her father. The only connection found between the child and Wisconsin is that she visited her relatives in Wisconsin nine times over the one-year period when she lived in Missouri with her grandfather. One of these visits was a ten-day vacation at the aunt and uncle's farm. However, short-term presence in the state is not enough to establish a significant connection with the state. *Vorpahl v. Lee*, 99 Wis. 2d 7, 10-12, 298 N.W.2d 222, 224-25 (Ct. App. 1980).

The aunt and uncle commenced the guardianship proceedings on March 17, 1986, at which time the child had been in Wisconsin for less than three weeks. The court found that since the child has resided with her aunt and uncle, she has adjusted well, and she has been able to renew her acquaintance with her relatives in Wisconsin. Although these are connections between the child and Wisconsin, it was improper to consider these factors because the jurisdictional requirements under the UCCJA must be met at the time of the commencement of the

proceeding. *Dragoo*, 99 Wis. 2d at 45, 298 N.W.2d at 232; *see also S. J. v. L.T.*, 727 P.2d 789, 792 (Ala. 1986) (subject matter jurisdiction either exists or does not exist at the time when the petition is filed with the court).

In contrast, to the child's sparse connection with Wisconsin, her connection with California was more significant. She was born in California and lived there for most of her life. Also, her father lives in California.

The commissioner's notes state that the purpose of sec. 822.03(2)(b) is "to limit jurisdiction rather than to proliferate it."[11] The notes require, therefore, that "[t]here must be maximum rather than minimum contact with the state."[12] When comparing the child's connection with Wisconsin and with California, it is clear that Wisconsin only had minimum connection while California had maximum connection.

Section 822.03(1)(c) requires that the child be physically present in the state and that the child has been abandoned or there is an emergency and the child needs protection. There are no facts that can sustain a finding of jurisdiction on this basis. The child had not been abandoned by her mother's death. There is no evidence that she was mistreated, abused or neglected. At all times after her mother's death, the child was well cared for. The Santa Clara County Juvenile Court placed her under protective custody and then released her to the physical custody of relatives. It was therefore inappropriate for Wisconsin to invoke jurisdiction under this subsection at the time of the guardianship proceedings.

Subsection (d) applies if one of two alternatives occur: (1) no other state would have jurisdiction under subsecs. (a), (b), or (c); or (2) another state has declined juris-

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[11] Commissioner's Notes to UCCJA sec. 3 [sec. 822.03, Stats], *reprinted in* 9 U.L.A. at 108 (West 1973), *cited in Vorpahl*, 99 Wis. 2d at 10 n. 3, 298 N.W.2d at 224 n. 3.

[12] *Id.*

diction. The first alternative clearly does not apply to this case because it is undisputed that California has jurisdiction as the child's "home state." The court found that the second alternative applied because the Santa Clara County Juvenile Court declined jurisdiction by releasing the child to them in order to commence custody proceedings in Wisconsin. This finding, however, is clearly erroneous because before the court entered its decree of jurisdiction in the guardianship proceedings, it had a telephone conference with the California court, which informed it that California had invoked jurisdiction by the proceedings held on February 26, 1986, in the Santa Clara County Juvenille Court; that California never declined jurisdiction; and thus Wisconsin should discontinue its proceedings.

Because it is clear that none of the criteria in sec. 822.03(1) had been met, the trial court correctly concluded that collateral estoppel did not apply. Here, the subject matter of the guardianship and TPR proceedings were so plainly beyond the Wisconsin court's jurisdiction that its entertaining the actions was a manifest abuse of authority. Additionally, to allow the previous rulings on jurisdiction to stand under the doctrine of collateral estoppel would substantially infringe on the proper tribunal, the California court. Also, for the reasons previously discussed, the trial court correctly concluded that proper jurisdiction on the custody issue lies in California.

By the Court.—Order affirmed.

APPENDIX K

SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO

Case No. OCV 38045

C.C.,

Plaintiff,

vs.

Estate of H.H., J.C., M.P. inclusive,

Defendants.

ORDER Re: Jurisdiction

[Filed July 29, 1986]

After hearing on June 17, 1986, before the Hon. Frank Tetley, appearing:

Beverly Jean Gassner for Plaintiff; C.C., Plaintiff; by telephone Elizabeth Goodley specially appearing for defendants; Mealy & Kelly by Richard Kelly for P.C. and J.H.; P.C. and J.H., Defendants in California and Petitioners in Wisconsin; Nowlan & Mouat by Daniel Dillon, Guardian ad Litem for the minors; Brennan, Steil, Ryan, Basting & MacDougall, S. C. by James Welker, specially appearing for C.C.

THE COURT FINDS that California has jurisdiction over issues of paternity and custody of the minor child, A.E.H., for the following reasons:

1) California is found to be the "home state" of the minor within the meaning of California Civil Code 5151(5); 9 Uniform Laws Annotated, hereafter cited as

U.L.A. 2(5); and 28 U.S.C. 1738A(a)(4), by virtue of the fact that she lived with her mother, H.H., in California, for at least six months prior to the filing of this action, and because

2) The minor child is absent from California only by virtue of her removal from the jurisdiction by the maternal relatives following the death of her mother, said relatives claiming a right of custody of the child.

3. Following the death of the minor's mother, a Petition was filed in the Superior Court In and for the County of Santa Clara, State of California, Juvenile Division, Petition No. 90565.

4) The minor was released to the maternal relatives by the Superior Court in and for the County of Santa Clara, State of California, Juvenile Division, following a false and/or fraudulent representation by the maternal relatives that the father of the minor was unknown and his whereabouts was unknown. Subsequently, the Juvenile Court Petition was dismissed.

5) At all times there was in existence a birth certificate of the minor, showing Plaintiff as the father of the minor child. Said birth certificate was not produced to the Santa Clara Juvenile Court.

6) C.C., Plaintiff in this action and the person named on the birth certificate of the minor child, at all times has lived and continues to live in the State of California.

7) No other state has jurisdiction pursuant to the "home State" doctrine and/or "significant contacts" doctrine within the meaning of CC 5152(1)(b); 9 U.L.A. 3(a)(2); and 28 U.S.C. 1738A(a)(4).

8) The Court finds that there is and was not an "emergency" within the meaning of Civil Code 5152(1)(c); 9 U.L.A. (3)(a)(3); and 28 U.S.C. 1738A(c)(2)(c) within the State of California or the State of Wisconsin.

The minor child was in Shelter Care in California and had not been abandoned in the State of Wisconsin.

9) The minor child and the Plaintiff have a significant connection with California that goes beyond mere physical presence in the jurisdiction.

10) There is available in California substantial evidence concerning the child's present and future care, protection, training and personal relationships. Evidence of such relationship is not found in Wisconsin.

11) A paternity action is a form of a custody case, governed by the Uniform Child Custody Jurisdiction Act and the Federal Parental Kidnaping Prevention Act.

12) Both California and Wisconsin have adopted the Uniform Child Custody Jurisdiction Act and are bound by its terms.

13) The Juvenile Court of Santa Clara County has no jurisdiction to determine which state should assume jurisdiction over paternity and custody issues. Its jurisdiction extends to protection issues and custody issues related to protection only.

14) The Juvenile Court of Santa Clara County did not assume jurisdiction over the minor child. It dismissed its case after releasing the child and determining that there was no remaining protection issue.

15) C.C. had no notice with respect to the Santa Clara Juvenile Court action and his right to a California determination as to paternity and custody was not lost by the Santa Clara Juvenile Court action.

16) California law gives custody preference to a natural parent over a third party unless both natural parents are deemed to be detrimental to the child. Civil Code 4600.

17) Due process requires that before a child custody determination is made, reasonable notice and opportunity

to be heard shall be given to the contestants, any parent whose parental right has not been previously terminated and any person who has physical custody of the child. Civil Code 5153 and 9 U.L.A. 4.

18) Wisconsin should not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in California where such court of California is exercising jurisdiction consistent with the provisions of U.S.C. 1738A(9), and/or Civil Code 5155(1) and/or 9 U.L.A. 6(a).

DATED: July 29, 1986.

/s/ Frank O. Tetley
FRANK O. TETLEY
Commissioner of the Superior Court

No. 91-353

In The

Supreme Court of the United States

October Term, 1991

IN THE INTEREST OF A.E.H., a Person Under the Age of 18:
C.C.,

Petitioner,

v.

P.C. and J.H.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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September 27, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Pursuant to 28 U.S.C. § 1738A and *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), did the California court fail to accord Full Faith and Credit to the Wisconsin court's prior order when the Wisconsin action was the first action to be filed in accordance with the UCCJA?

2. Pursuant to 28 U.S.C. § 1738A and *Durfee v. Duke*, 375 U.S. 106, 111 (1963), did the California court fail to accord Full Faith and Credit to the Wisconsin court's prior order when it allowed the petitioner to collaterally attack the fact-finding of the first Wisconsin trial court even though the petitioner appeared in the Wisconsin proceeding and failed to appeal the Wisconsin court's ruling?

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STATEMENT OF THE CASE

H.H., a native of the state of Wisconsin, was murdered on February 23, 1986 in the state of California where she was stationed with the United States Navy. H.H.'s two non-marital children, A.E.H., age two and one-half years, and N.H., age four years, were born to separate fathers, neither of whom had established paternity. (Resp. App., pp. 5-6, 11). The Navy had no record of the fathers' identities or existence and, therefore, contacted H.H.'s relatives in Wisconsin, who were the only persons listed in Navy records as next of kin or persons to contact in the event of an emergency. (Resp. App., pp. 11-12, 14, 22-23). An uncle of the children arrived in California and presented California authorities with a copy of H.H.'s Will showing that she named her sister and brother-in-law, respondents P.C. and J.H., as guardians of her children. (Pet. App., p. 5a). Neither the California court nor A.E.H.'s uncle was aware of the identity of the father of either child. (Resp. App., pp. 12-13, 22, 27; Pet. App., pp. 38a-39a). In an Order dated February 26, 1986, the referee of the Santa Clara County (California) Juvenile Court dismissed the original petition commencing the juvenile court action, which had been filed the previous day, released the children to the custody of their uncle for return to the state of Wisconsin and set aside a jurisdictional hearing that was to have been held on March 14, 1986. (Resp. App., pp. 1-3; Pet. App., pp. 5a-6a). Over two weeks later, a man claiming to be the father of A.E.H., petitioner C.C., first made his presence known by appearing at the naval base and inquiring as to the whereabouts of H.H. (Pet. App., pp. 6a-7a).

The foregoing paragraph is representative of the many facts adverse to C.C. that he fails to present in his petition. It consists of facts established in Wisconsin proceedings, and relied upon by the Wisconsin Supreme Court in its determination that Wisconsin properly exercised and could continue to exercise jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA). C.C. chooses to present only the facts found by California courts.

United States Supreme Court Rule 15.1 requires a respondent to alert the Court to misstatements of fact and omissions contained in a Petition for Writ of Certiorari. That rule, as well as the interests of fairness, requires respondents to present an alternative statement of facts to alert the Court to the one-sided nature of petitioner's statement of the case.

As previously noted, neither the Navy nor California court officials had knowledge of C.C.'s existence or identity until after the children were released to their uncle and taken to Wisconsin. (Resp. App., pp. 12-13, 22; Pet. App., pp. 38a-39a). While C.C. states that this release, and the concomitant dismissal of the pending juvenile action in California, was based upon false or fraudulent misrepresentations by the Wisconsin relatives, neither California Courts of Appeal which reviewed this case asserted or relied on this finding. (Pet. App., pp. 40a-41a). The California trial court's finding was based on a belief that the Wisconsin relatives could have produced A.E.H.'s birth certificate. (Pet. App., p. 91a). In fact, the birth certificate was filed in California, not Wisconsin. (Resp. App., p. 13).

The Wisconsin courts found that respondents and the uncle who traveled to California to secure the children had no knowledge of the identity or whereabouts of the father of either child. (Resp. App., pp. 12-13, 27). Upon discovering that a man claiming to be the father of A.E.H. had contacted Navy officials, respondents attempted to serve him with notice of recently commenced Wisconsin guardianship proceedings. Although relying upon an address given by C.C. to police and military authorities almost three weeks after H.H.'s death, C.C. was not residing at that address, and personal service was not obtained until June, 1986. An investigation showed that C.C. had not lived at this address for at least four years. (Pet. App., pp. 6a-7a).

Following the February 26, 1986 dismissal of the California juvenile proceeding, P.C. and J.H. commenced guardianship proceedings in Wisconsin on March 17, 1986 to effectuate the provisions of H.H.'s Will. As previously noted, they had difficulty serving C.C. (Pet. App., p. 7a). Eventually he was tracked down, and appeared specially in these proceedings objecting to Wisconsin's jurisdiction. (Pet. App., p. 9a). C.C. filed a competing California action on April 1, 1986, belatedly seeking to establish his paternity and obtain custody of A.E.H. Wisconsin relatives of the decedent specially appeared and objected to California's jurisdiction. (Pet. App., p. 7a).

From this point on, petitioner's recitation of the parallel proceedings in Wisconsin and California is chronologically accurate. He continues, however, to omit important facts found by the Wisconsin courts. In particular, C.C. fails to refer to the detailed findings of fact made by the circuit court for Rock County (Wisconsin) to

support the appointment of P.C. and J.H. as guardians of A.E.H. and her half-brother, and to support its decision not to defer to the jurisdiction of the California courts.[1] (Resp. App., pp. 5-18).

In addition to rejecting C.C.'s allegations of fraud and misrepresentation by the Wisconsin relatives, the Wisconsin trial court also found that C.C. did not have a close relationship with A.E.H. prior to H.H.'s death. (Resp. App., pp. 7-8, 11-14, 27-28). He made no efforts to establish his paternity, he never materially contributed to the support of A.E.H., he lived over 400 miles away from A.E.H. and he had no contact whatsoever with A.E.H. for a one-year period during which A.E.H. was in Missouri with her maternal grandfather while her mother was on sea duty. (Resp. App., pp. 9-10, 17-18, 26). In the words of the guardianship court, the Honorable John H. Lussow, presiding, "C.C. has, at best, been only an occasional visitor of A.E.H. . . . C.C. does not have an intimate relationship with A.E.H." (Resp. App., pp. 17-18).

On the other hand, Judge Lussow found that H.H. and her children had maintained close ties with her family in Wisconsin, that P.C. and J.H. had provided financial assistance to H.H. prior to her death, that the children had adjusted well to life on the farm of P.C. and J.H. and that they were in regular, almost daily contact with other relatives, including two cousins in a similar age group. (Resp. App., pp. 8-10, 14-15).

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[1] C.C. also fails to point out that P.C. and J.H. subsequently adopted A.E.H.'s brother. (Pet. App., p. 9a n.7). Thus, the decisions of the California courts would separate A.E.H. from her sibling.

He found that there was available in Wisconsin substantial evidence concerning the children's present and future care and that the children had significant connections with the state. (Resp. App., pp. 19-22). He found that they had been abandoned and that there was an emergency, and he found that California had declined to exercise its jurisdiction by dismissing the Santa Clara county juvenile proceedings and releasing the children for return to Wisconsin. (Resp. App., pp. 22-23). Based on these findings, Judge Lussow found that Wisconsin had jurisdiction under the UCCJA pursuant to Wis. Stat. § 822.03(1)(b)(c) and (d) (UCCJA as adopted by Wisconsin). (Resp. App., p. 19).

C.C.'s petition makes factual misrepresentations to this Court regarding his relationship to A.E.H. and her mother H.H. which conflict with evidence in the record. C.C. claims that he resided in California since before A.E.H.'s birth to the present. (Petition, p. 6). None of his appendix references supports this statement and it directly conflicts with the evidence at the paternity hearing where he stated that he was living in Texas around A.E.H.'s birth. (Resp. App., p. 30). Thus, at the time of H.H.'s death, A.E.H. could not have seen C.C. for at least one and one-half years of her two and one-half year life.

C.C. claims in his petition that he offered support for A.E.H. and offered to marry H.H., but was refused. (Petition, p. 7). The only evidence in the record that could be corroborated by someone other than the deceased mother was C.C.'s acknowledgement that when the mother had asked for support, he refused to pay (Resp. App., p. 32), and that when H.H. needed money for nursery school,

the respondents, not C.C., provided regular monthly payments. (Resp. App., p. 8). With regard to C.C.'s marriage proposal to H.H., C.C. was married to another woman after A.E.H. was born. (Resp. App., p. 30).

C.C.'s inference that he "could not confirm that his daughter was removed from the State of California until approximately three weeks later" (Petition, p. 7) is misleading. He was not aware of H.H.'s death until he came to see her almost three weeks after the murder. As soon as he arrived, he was informed of the death and, as soon as he inquired, was given the whereabouts of his daughter. (Resp. App., p. 31). Rather than contact the Wisconsin relatives regarding A.E.H., he gave a false address to the authorities and then filed a California action claiming that he did not know where A.E.H. was and that there was no action pending in another state. (Pet. App., pp. 6a-7a). If C.C. did not receive certain information about A.E.H., it is because he did not ask for it.

The guardian ad litem noted that C.C. always blamed others for his lack of a relationship with his daughter. (Resp. App., p. 33). He continues this practice in his petition to this Court.

C.C.'s petition notes that the California court later determined that the dismissal of the juvenile proceedings did not constitute a decision to decline jurisdiction. (Petition, p. 22). It must be emphasized, however, that this determination was subsequent to the dismissal of the California juvenile proceedings and after commencement of the Wisconsin proceedings and was not part of an appellate review of the juvenile court proceeding. (Pet. App., pp. 58a-59a, 40a-41a). In addition to arising long

after the jurisdictional dispute was evident, these *ex post facto* statements of intent were not made by the same judicial officer who signed the order dismissing the California juvenile proceedings. (Resp. App., pp. 1-3; Pet. App., pp. 58a-59a).

Following their appointment as guardians, P.C. and J.H. petitioned the Rock County (Wisconsin) circuit court to terminate C.C.'s parental rights. Judge Patrick Rude affirmed and adopted the jurisdictional findings made by Judge Lussow in the guardianship proceeding. C.C. was found to be the father of A.E.H. over three and one-half years after the child's birth. (Pet. App., p. 9a). Because the jury found no grounds to terminate C.C.'s parental rights, P.C. and J.H. commenced common law proceedings on June 19, 1987, to obtain custody pursuant to the standards set forth in *Barstad v. Frazier*, 118 Wis. 2d 549 (1984). (Pet. App, p. 11a).

In the meantime, C.C. requested the California paternity court to incorporate the Wisconsin paternity judgment and proceeded to obtain custody in that state. (Pet. App., pp. 7a, 11a-12a). Because two Wisconsin courts had upheld the jurisdiction of Wisconsin to determine this matter, P.C. and J.H. objected to California's jurisdiction, and appeared by counsel, not in person. (Pet. App., p. 7a). No guardian ad litem was appointed in the California proceeding. (Pet. App., pp. 38a, 47a, 55a, 58a). The California court refused to admit a psychological evaluation of the child performed by a Wisconsin psychologist. There was no independent testimony concerning the best interests of the child by anyone who had actually met with, and evaluated A.E.H. (Pet. App., pp. 49a-52a). P.C. and J.H. appealed the order awarding sole custody to

C.C. (Pet. App., p. 47a). Their unsuccessful appeals in California were not finally resolved until this matter was pending before the Wisconsin Supreme Court. (Pet. App., p. 54a).

When the Wisconsin custody action came before Judge Rude for determination, he took judicial notice of the California Court of Appeals decision affirming the award of sole custody to C.C., and reversed his earlier affirmance and adoption of Judge Lussow's jurisdictional findings. The Wisconsin custody action was dismissed, and P.C. and J.H. appealed to the Wisconsin Court of Appeals. (Pet. App., p. 12a). The Court of Appeals affirmed the circuit court's dismissal of the custody action. *In the Interest of A.E.H.*, 152 Wis. 2d 182 (Ct. App. 1989). (Pet. App., p. 77a).

Two issues were presented in that court. First, whether the guardianship and termination of parental rights proceedings were custody proceedings pursuant to the UCCJA. Second, whether Judge Rude was barred by *res judicata* from reconsidering his previously adopted findings of jurisdiction. The Wisconsin Court of Appeals found that while the guardianship and termination of parental rights proceedings were "custody" proceedings within the meaning of the UCCJA, the circuit court in the subsequent custody action was not precluded from redetermining jurisdiction because the lack of UCCJA jurisdiction in the two previous proceedings was so obvious as to constitute a "manifest abuse" of jurisdictional authority by those courts. (Pet. App., pp. 85a, 89a).

The Wisconsin Supreme Court reversed the Court of Appeals. *In the Interest of A.E.H.*, 161 Wis. 2d 277 (1991).

(Pet. App., p. 1a). While holding that the Wisconsin custody court had authority to consider its subject matter jurisdiction to modify the California order, the Supreme Court disagreed with the Court of Appeals that the previous findings of jurisdiction constituted a manifest abuse of authority. On the contrary, the Supreme Court held that the Wisconsin circuit court had jurisdiction under the UCCJA in all three proceedings, including the custody proceeding dismissed by Judge Rude. (Pet. App., p. 4a).

The Wisconsin Supreme Court concluded that custody proceedings under the UCCJA were commenced in Wisconsin on March 17, 1986 when respondents P.C. and J.H. filed a guardianship petition in Wisconsin. (Pet. App., p. 18a). The Court found two bases for jurisdiction at that time under the UCCJA. First, the Court found jurisdiction under Wis. Stat. § 822.03(1)(b) requiring that the child and at least one contestant must have a significant connection with the state, and that there must be available in the state substantial evidence concerning the child's present or future care, protection, training and personal relationships. The Supreme Court noted that on March 17, 1986 when the guardianship petition was filed, C.C. had never been adjudicated as the father and there were no known relatives in California. On the other hand, all of the child's then known relatives, including her brother, were present in Wisconsin on that date. (Pet. App., pp. 18a-20a).

Second, the Wisconsin Supreme Court found that California had declined jurisdiction, thus giving Wisconsin authority to proceed pursuant to Wis. Stat. § 822.03(1)(d). (Pet. App., pp. 21a-22a). In this regard, the

Supreme Court found unpersuasive the subsequent declarations of the California courts attempting to explain that the dismissal of the California juvenile proceeding was not a declination of jurisdiction. (Pet. App., pp. 21a-22a). Those explanations were not in existence at the time of the filing of the Wisconsin guardianship petition, nor were they made by the commissioner who dismissed the action. As stated by the Wisconsin Supreme Court: "We find much more persuasive the document filed on February 26, 1986, dismissing the original petition regarding placement of the child and releasing her to the custody of her uncle. This is the document which was in existence on March 17, 1986, the day the guardianship petition was filed in Wisconsin." (Pet. App., p. 22a).

Considering the existence of parallel proceedings in the State of California, the Wisconsin Supreme Court noted that no California proceedings were pending at the time that the Wisconsin guardianship proceedings were initiated on March 17, 1986, and cited authorities to support the principle of first in time as the basis for resolving such jurisdictional deadlocks. (Pet. App., pp. 25a-27a). The Wisconsin Supreme Court further concluded that Wisconsin was not an inconvenient forum and, therefore, had no reason to decline jurisdiction to California on the grounds of comity. (Pet. App., pp. 27a-29a).

The Wisconsin Supreme Court went on to find that each new custody proceeding under the UCCJA constitutes a modification proceeding pursuant to § 14 of the Act. (Pet. App., pp. 30a-31a). Because California had awarded sole custody to C.C. by the time P.C. and J.H. initiated the Wisconsin custody proceeding in front of Judge Rude, the Wisconsin Supreme Court determined

that the Wisconsin courts could proceed only if California had " 'lost' jurisdiction by not fulfilling the jurisdictional prerequisites of the UCCJA." (Pet. App., p. 34a).

The Wisconsin Supreme Court concluded that California had "lost" jurisdiction at the time the Wisconsin custody proceeding was filed on June 19, 1987. (Pet. App., pp. 34a-36a). At that time, California was no longer the home state. Indeed, the child, then age four, had been in Wisconsin for sixteen (16) months. (Pet. App., pp. 34a-36a). The Wisconsin Supreme Court concluded that the Wisconsin circuit court had jurisdiction under the UCCJA to modify the California custody decree, and therefore reversed and remanded to the Wisconsin circuit court for a custody hearing. (Pet. App., p. 37a).

ARGUMENT

I. THE ISSUE RAISED BY PETITIONER IS NOT RIPE FOR CONSIDERATION BY THIS COURT.

A. There Is No Clear Present Conflict Between The Wisconsin And California Courts On The Issue Of Wisconsin's Jurisdiction To Modify The California Order.

Petitioner argues that the Wisconsin Supreme Court's determination that Wisconsin has sole jurisdiction to modify the California order creates a conflict between two state courts. This is incorrect. First, California has never addressed whether California or Wisconsin has jurisdiction to modify the existing California order. Modification jurisdiction is a separate determination from initial jurisdiction. 28 U.S.C. § 1738A(c) and (g). Since we

do not know how California would rule on the issue of modification jurisdiction, there is no clear conflict on this issue.

Second, the Wisconsin Supreme Court's decision simply did not raise a Full Faith and Credit issue. The Wisconsin Supreme Court expressly stated that it did not address the validity of the California order. (Pet. App., p. 32a). It rested its decision on whether Wisconsin could modify that order in accordance with 28 U.S.C. § 1738A(f). (Pet. App., pp. 36a-37a).

The Wisconsin Supreme Court concluded that at the time the modification request was made, not only had Wisconsin become the child's home state, but California had lost jurisdiction in the intervening period of time. It based this conclusion on the then current facts in light of the relevant provisions of the Uniform Child Custody Jurisdiction Act as adopted by both California and Wisconsin. (Pet. App., pp. 34a-37a). In that analysis, it was clear that, at the time of the modification, Wisconsin had the greater contacts with the child and child's family, including her brother who had been adopted by the respondents.

The Wisconsin Supreme Court also reaffirmed the finding of the first Wisconsin circuit court that California had declined jurisdiction on February 26, 1986, by dismissing the juvenile court proceeding. (Pet. App., p. 22a). This finding negates the impact of California being the home state on that date. 28 U.S.C. § 1738A(c)(2)(D)(i); *Thompson v. Thompson*, 484 U.S. 174, 177 (1988); Wis. Stat. § 822.06(1). Since California had declined to exercise jurisdiction, Wisconsin was free to exercise jurisdiction

because the child was present in Wisconsin and home state analysis is irrelevant.

The petitioner continues to ignore that this finding had to be based on facts known at the time the Wisconsin action was filed on March 17, 1986. *Thompson*, 484 U.S. at 177. The *ex post facto* findings of "intent" by the California courts are irrelevant.

It is irrelevant that a California trial court, that was not even involved in the initial California action that was dismissed, came to a contrary conclusion seven months later in a letter to a different California trial court. The fact that the California courts continued to exercise jurisdiction contrary to the UCCJA is also irrelevant to the finding of fact made by the Wisconsin court as of March 17, 1986. Neither the judge's letter nor the continued exercise of jurisdiction was a part of the normal appeal and review process from the first commissioner's order dismissing the California case and allowing the children to move to Wisconsin.

As will be discussed later in this Brief, the Full Faith and Credit Clause was violated in this case by the California courts refusal to honor the prior Wisconsin order, not by the Wisconsin Supreme Court's determination that Wisconsin has jurisdiction to modify the California order.

This Court should not grant the petition based on the issue of modification jurisdiction since there is no clear conflict that must be resolved on this issue. *Poe v. Ullman*, 367 U.S. 497 (1961). The petitioner is asking this Court to assume that the California courts will refuse to give Full Faith and Credit to a Wisconsin order modifying the California order. The California courts' past refusal to

accord Full Faith and Credit to the Wisconsin order was not a result of the decision of the Wisconsin Supreme Court which is before this Court. Therefore, the Wisconsin Supreme Court's decision raises no error that requires review by this Court.

B. The Supreme Court Traditionally Avoids Involvement In State Court Family Law Matters And In Fact-Finding.

If this Court reviews the Wisconsin court's finding of modification jurisdiction, it not only will discover that there is no clear interstate conflict, but that the petitioner is requesting this Court to usurp the role of the fact-finder in a state court case.

When a state trial court determines jurisdiction to modify another state's court order, it makes a fact-based determination in light of the relevant factors of the UCCJA and 28 U.S.C. § 1738A. *Thompson*, 484 U.S. at 186 n.4. Such a fact-based determination is subject to review on appeal by that state's appellate court only as to whether the facts are clearly erroneous, or whether the facts, if true, are sufficient to support the court's determination as a matter of law. Wis. Stat. § 805.17(2).

The U.S. Supreme Court has traditionally avoided involvement in domestic cases because they involve an area of uniquely state concern. *Thompson*, 484 U.S. at 185-87; *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). In addition, the U.S. Supreme Court traditionally has refused to correct factual errors of the state supreme courts, and affirmatively declined to do so in *Thompson*. 484 U.S. at 186-87.

A comparison of the one-sided California facts selectively cited by the petitioner with the facts found by the first Wisconsin circuit court and approved by the Wisconsin Supreme Court, reflects the fact-based nature of these determinations. The proper remedy for the petitioner if he did not agree with the first Wisconsin circuit court's fact findings was to appeal to a Wisconsin appellate court and argue that such findings were clearly erroneous. Wis. Stat. § 805.17(2). C.C. never appealed the determination of the Wisconsin guardianship court finding UCCJA jurisdiction. When, several months later, and after a second Wisconsin proceeding had been commenced, C.C. proceeded in federal court, the district court directed him to exhaust his state remedies first. *Crouse v. Creanza*, 658 F. Supp. 1522, 1529 (W.D. Wis. 1987). He had failed to do so.

Instead, he went to California and relitigated some of those same facts, and collaterally attacked the Wisconsin court's factual findings. He now asks this Court to approve the selective California fact-finding that he presents, when the Wisconsin court he is challenging relied on very different facts – facts he chose not to challenge on direct appeal.

The U.S. Supreme Court is not a fact-finder for state courts. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). If this Court accepts this petition for the purpose of reviewing the Wisconsin court's determination of modification jurisdiction, it is in effect acting as such a fact-finder and error correcter. Then the question presented will be: Why should this Court accept the California court's fact-findings rather than the Wisconsin court's fact-findings?

As discussed later in this Brief, this Court has provided appropriate touchstones for review of these cases that do not involve second guessing the fact-finding of the Wisconsin circuit court as approved by the Wisconsin Supreme Court.

The issue raised by the petitioner does not raise a Full Faith and Credit problem and does not present a clear conflict between two state courts. Instead, the petitioner asks the U.S. Supreme Court to act as a fact-finder between two state courts and to correct factual errors of one of them. The petition should not be granted on this basis.

II. THE REAL ISSUE FOR THIS COURT TO REVIEW IS THE CALIFORNIA COURTS' FAILURE TO ACCORD FULL FAITH AND CREDIT TO THE WISCONSIN COURT'S PRIOR DECISION.

A. The Petitioner Has Misstated The Issue.

The real issues the Court must address if it grants the petition are whether:

> 1. Contrary to *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), California failed to accord Full Faith and Credit to the Wisconsin court's prior order when the Wisconsin action was the first action to be filed in accordance with the UCCJA; and whether,
>
> 2. Contrary to *Durfee v. Duke*, 375 U.S. 106, 111 (1963), California failed to accord Full Faith and Credit to the Wisconsin court's prior order when it allowed the petitioner to ignore, and thus, collaterally attack, the fact-finding of the

first Wisconsin circuit court even though the petitioner appeared in the Wisconsin proceeding and failed to appeal the Wisconsin court's ruling.

At the time that the California Supreme Court denied review of the California Court of Appeals' decision, the Wisconsin Supreme Court had not yet reversed the Wisconsin Court of Appeals' decision which was in accord with the California decision. Thus, during the relevant time for filing a Petition for a Writ of Certiorari from the California Supreme Court decision, there was no conflict between state courts, and thus no basis for this Court to exercise its jurisdiction.

The Wisconsin Supreme Court has since determined that it has jurisdiction to modify the California order. That determination was based in part on its affirmance of the initial Wisconsin circuit court's findings that California had declined jurisdiction and that Wisconsin had more significant contacts. Thus, this Court must review that initial Wisconsin circuit court's determination of its jurisdiction in March, 1986. In doing so, it will review the failure of the California trial court to honor the Wisconsin court's fact-finding and order contrary to the Full Faith and Credit Clause, Article IV, § 1 of the United States Constitution.

B. Contrary To *Thompson v. Thompson*, California Failed To Accord Full Faith And Credit To The Wisconsin Court's Prior Order When The Wisconsin Action Was Filed Before The California Action In Accordance With The UCCJA.

Although the relevant state statutes adopted by California and Wisconsin are in accord with the Uniform

Child Custody Jurisdiction Act, the relevant federal statute in this area is 28 U.S.C. § 1738A, popularly known as the Parental Kidnapping Prevention Act (PKPA). This federal statute was intended to fill the gaps in those states which had not adopted the UCCJA in their state's statutory scheme and to address some inconsistencies in state statutes in this area. *Thompson*, 484 U.S. at 181. To the extent the provisions of the state statute conflict with the PKPA, the PKPA governs. *Sams v. Boston*, 384 S.E.2d 151, 156 (W. Va. 1989); *Murphy v. Woerner*, 748 P.2d 749, 750 (Alaska 1988).

In this case, the PKPA does not conflict with the relevant provisions of the UCCJA. The Wisconsin Supreme Court found that the Wisconsin circuit court had properly exercised its jurisdiction in accordance with the UCCJA and the PKPA.

The Wisconsin circuit court found that at the time the Wisconsin guardianship action was filed on March 17, 1986, the facts were as follows:

> 1. There was no other action pending in any other state. (Pet. App., p. 22a).
>
> 2. The state which had home state jurisdiction had dismissed its action, had cancelled a jurisdictional hearing and released the children to relatives in Wisconsin, knowing that they were going to Wisconsin and that a Wisconsin court would be addressing guardianship proceedings. (Pet. App., pp. 5a-6a; Resp. App, pp. 1-3).
>
> 3. The respondents did not in any manner obtain custody of the children through fraud or

misrepresentation. (Resp. App., pp. 7-9, 11-14, 27-28).

4. No person had been adjudicated the father of A.E.H. (Resp. App., p. 25).

5. Most of the child's known relatives, including her half-brother with whom she had lived her entire life, were in Wisconsin. (Resp. App, pp. 19-21).

6. The respondents, who were named as guardians of both children by the mother in her Will, resided in Wisconsin. (Resp. App., pp. 10-11, 14).

7. The children had spent time with the Wisconsin relatives both in Wisconsin and in California. (Resp. App., pp. 6-10).

8. A person claiming to be the father of A.E.H. had not made his identity or existence known until he showed up at the naval base almost three weeks after the mother's death. (Resp. App., pp. 12-13, 26).

Eight days after filing the petition for guardianship in the Wisconsin circuit court, the respondents attempted service on the petitioner at the address he had given the officer at the naval base. One week after this attempt, notice by publication appeared in the area where the petitioner had claimed residence. At the same time, the county sheriff attempted personal service upon the petitioner at this same address. Finally, on June 20, 1986, the petitioner received notice by express mail, return receipt requested.

It was later discovered that the address that the petitioner had given the police and military authorities

on March 14, 1986 had not been his residence for at least four years. (Pet. App., pp. 6a-7a).

Under the UCCJA, personal service is not required and the publication of notice when other means had failed complied with the service requirements of UCCJA, Wis. Stat. § 822.05(1).

While the petitioner was avoiding service of the Wisconsin action, he filed an action in California claiming that there was no other action pending related to the child and that he did not know who had physical custody of the child. However, he served notice of his action to the Wisconsin relatives on May 6, 1986. (Pet. App., p. 7a).

In *Thompson*, 484 U.S. at 177, this Court concluded that the first state in which an action is filed in accordance with the provisions of the PKPA assumed jurisdiction over competing claims of other states where actions were subsequently filed. Aside from the fact that the California juvenile action was dismissed, petitioner acknowledges that this first California action did not provide adequate notice. (Petition, p. 22).

At the time the Wisconsin court exercised jurisdiction, there was no other action pending and proper notice was given to all parties. The California court had declined to exercise jurisdiction when it dismissed its action and sent the children to Wisconsin knowing that a guardianship proceeding would be commenced in Wisconsin. (Resp. App., pp. 1-3, 18-19, 23-24; Pet. App., pp. 5a-6a, 22a). This is all that is required by the PKPA and *Thompson* for valid exercise of jurisdiction by the Wisconsin court.

This Court has emphasized that it does not want to become embroiled in these state battles and has supported the "first-in-time" filing rule in *Thompson*. This rule eliminates the need to second-guess the fact-finding of two different state courts in resolving a jurisdictional battle. This rule emphasizes that the facts are to be determined at the time of the *filing*, not the time of service or any other time.

Since Wisconsin meets the "first-in-time" rule under *Thompson*, there is no need to review the Wisconsin Supreme Court's decision that Wisconsin, in addition to exercising initial jurisdiction properly, also has jurisdiction to modify any California order that may exist.

C. Contrary To *Durfee v. Duke*, California Failed To Accord Full Faith And Credit To The Wisconsin Court's Prior Order When It Allowed The Petitioner To Collaterally Attack The Fact-Finding Of the Wisconsin Trial Court Even Though The Petitioner Appeared In The Wisconsin Proceeding And Failed To Appeal The Wisconsin Court's Ruling.

In *Durfee v. Duke*, 375 U.S. 106, 112 (1963), this Court held that a state court violates the Full Faith and Credit Clause when it redetermines another tribunal's determination of subject matter jurisdiction after the same parties have litigated the issue in the first tribunal.

In *Durfee*, the Nebraska court had determined that it had jurisdiction to determine title to a tract of land that each party claimed was in a different state. After fully litigating the factual issues necessary for the Nebraska

court to resolve the jurisdictional issue, the losing party filed an action related to the same property in a Missouri state court, claiming that the property was in Missouri and the Nebraska court did not have jurisdiction to decide that issue. This Court in *Durfee* concluded that the fact of whether the property was in Nebraska or Missouri could not be relitigated and the issue of the Nebraska court's jurisdiction could not be relitigated without violating the Full Faith and Credit Clause.

> Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. *Durfee*, 375 U.S. at 109.

The Wisconsin court made factual findings necessary under the UCCJA, consistent with the PKPA, that, if made by a California court, would have been given full *res judicata* effect. All parties participated in that proceeding and the petitioner could have requested a review of that proceeding in Wisconsin. It is clear that the California court would have given the findings of the Wisconsin order as of March 17, 1986 *res judicata* effect had they been made by a California court.

The Court in *Durfee* noted that in *Davis v. Davis*, 305 U.S. 32 (1938), a divorce case, where the original court made a factual determination of domicile in order to determine whether it had subject matter jurisdiction to grant a divorce, the subsequent forum could not relitigate the issue of domicile in order to redecide the issue of jurisdiction. *Durfee*, 375 U.S. at 112, 113.

By allowing the petitioner to collaterally attack the Wisconsin court's findings of fact, the California court acted contrary to 28 U.S.C. § 1738A(g), an addendum to the Full Faith and Credit Statute, which states:

> (g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

Since Wisconsin had made the factual findings necessary to conclude that it had jurisdiction under the UCCJA and PKPA, the California court could not redetermine those facts. However, the California court did redetermine those facts, reached different conclusions about those facts, and concluded that Wisconsin was not exercising jurisdiction consistently with the provisions of the UCCJA. Had it adopted the Wisconsin court's facts, it could not have reached such a conclusion.

Despite the clear policy of the UCCJA and PKPA to prevent multiple litigation, the California trial court allowed the petitioner to challenge the Wisconsin facts in California, and to obtain review of those facts by a California appellate court which appeared unconcerned that a Wisconsin circuit court had previously found contrary facts. The petitioner's attempts to ignore the original fact-finding by the Wisconsin circuit court continue as he failed to include this decision in his appendix and failed to acknowledge most of the facts found by the Wisconsin court which conflicted with those of the California court.

The California court's willingness to redetermine whether Wisconsin had jurisdiction violated the Full Faith and Credit Clause and is contrary to this Court's holding in *Durfee v. Duke*. If this Court grants certiorari in this case, the respondent respectfully requests that it address this issue.

III. IT IS IN THE BEST INTERESTS OF THE CHILD TO ALLOW THE WISCONSIN COURT'S DECISION TO STAND.

This Court has acknowledged that a jurisdictional determination under the PKPA may turn on the child's "best interests". *Thompson*, 474 U.S. at 186 fn. 4. Indeed, it is the overriding principle to be applied by courts in exercising their jurisdiction under the UCCJA and PKPA.

If this Court grants this petition, a review of the record will reveal that only the Wisconsin courts have considered this child's best interests at any juncture. In California, no guardian ad litem was appointed to represent the child in any proceeding. At the California "custody" trial there is nothing in the record showing testimony by anyone who had spoken with the child since her mother's death or by any professional who had ever spoken with or seen the child. When the respondents' California counsel moved to admit the deposition of the child's Wisconsin psychologist who had seen her and her brother soon after arriving in Wisconsin and who continued to treat the children, the California court denied its admission even though C.C. had been represented at the deposition. (Pet. App., pp. 49a-51a). The California court order only provides that visitation with

the respondents and A.E.H.'s brother will be worked out *after* the child is in California. (Pet. App., pp. 56a-57a).

This child was two and one-half years old when her mother was murdered. She is now eight years old. Her now ten-year-old brother is the only person she has lived with her entire life. That brother has been adopted by the respondents and will remain in Wisconsin. The California court saw no need to consider testimony by anyone who actually knew this child, or by anyone who could testify about the impact of losing her brother immediately after losing her mother. We can only assume that the California court has even less concern about these matters now.

The PKPA and the UCCJA require courts to apply the overriding standard of the best interests of the child in rendering their decisions. They are not to consider the best interests of an adult who was a stranger to this child, and who had never bothered to be adjudicated the father or to pay child support. Only the Wisconsin court has applied the best interests of the child standard in determining its jurisdiction. (Resp. App., pp. 19-25). Only the Wisconsin court has demonstrated that in a custody determination it would protect the child's interests with the appointment of a guardian ad litem.

In Wisconsin, the standard to be applied in custody matters between relatives and a parent is stated in *Barstad v. Frazier,* 118 Wis. 2d 549, 568 (1984). The court may award custody to the relative if the parent is unfit, is unable to care for the child *or* if there are compelling circumstances to justify awarding custody to a non-parent. Because the biological parent's rights are not being terminated, the law applies a lesser standard in custody

cases than in termination of parental rights cases. In California, the trial court made its findings that there would be no detriment to the child to live with her father without taking any testimony by anyone who had even met with this child or observed her living situation with the respondents and her brother in Wisconsin. (Pet. App., pp. 51a-52a). There has been no fully litigated custody proceeding.

Petitioner cites *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989), for the proposition that this Court may ignore the impact of the change in custody on this child. In *Holyfield*, the Court was applying a specific federal statute which presumes that it is in the best interests of Indian children to have their custody and placement determined by tribal courts. *Id.* at 33 and 37. Thus, the best interests of those children had been decided by Congress.

That is simply not the case in applying the PKPA and UCCJA, where trial courts have an affirmative duty to consider the best interests of the children in deciding their jurisdiction. These statutes recognize that more than one state may have jurisdiction at a time. 28 U.S.C. § 1738A(c); Wis. Stat. § 822.03 and Wis. Stat. § 822.06. That is why the "first-in-time" rule and the overriding concern of the best interests of the child govern in these cases.

If this Court were to review the case, it would be required to consider whether the best interests of the child will be served by litigating custody in Wisconsin or California. While this Court might reach its conclusion by a different route than either the Wisconsin or the California courts, it would find that the best interests of this

child are clearly served by litigating custody in Wisconsin rather than California.

By denying the petition and allowing the Wisconsin Supreme Court's decision to stand, this Court will be reaching the same result.

CONCLUSION

The Wisconsin Supreme Court correctly decided that Wisconsin could modify the California order, and could have reached the same result on grounds that the first California court declined jurisdiction and that the petitioner is precluded from collaterally attacking the fact-finding of the first Wisconsin circuit court.

The Petition for a Writ of Certiorari to review the Wisconsin Supreme Court's decision on the issue of modification jurisdiction should be denied because it does not present a clear conflict between two state courts, it requests this Court to act as an arbiter of facts between two state courts, it does not raise the real issues the Court will have to decide if it grants the petition and, most importantly, because it is contrary to the child's best interests.

I am authorized to inform the Court that the Guardian ad Litem for A.E.H. approves of and joins in this Brief in Opposition.

Respectfully submitted,

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September 27, 1991

For the County of Santa Clara
JUVENILE COURT

In Behalf of A.E.H. Petition No. 90565

Birth Date: August 2, 1983 Age: 2

FINDINGS AND ORDER
OF REFEREE

Proceedings were had before me as Referee of this Court on this date.

Present: ___ Minor
___ Mother
___ Father
___ Ex parte

Clerk J. Elliott

Court Officer C. Shields

Court Reporter B. Navarro

District Attorney D. Soares

Public Defender _____

Uncle; Naval Officer

_ Parties present advised of their Constitutional Rights and the nature of the Juvenile Court proceedings.

_ Parties knowingly, intelligently, and voluntarily waived Constitutional Rights.

_ Attorney(s) stipulated to Referee Hearing.

_ Original ___ Supplemental Petition(s) filed _____ read and explained.

_ Evidence was heard and considered.

THE COURT FINDS:

X Notice of this Hearing was given to all necessary persons.

_ The allegations of the Section 300a Petition filed __, are sustained.

_ Minor is a person as described by Section 300a of the Welfare and Institutions Code.

THE COURT ORDERS:

X Minor released from the Children's Shelter to the custody of the uncle. effective _____.

_ Probation Officer to arrange for transportation of minor to State of legal residence, _____; minor to be released from custody when travel arrangements are made.

_ Juvenile Probation Department to pay for transportation of minor and apply to appropriate agency for reimbursement.

X Original ___ Supplemental Petition filed February 25, 1986 is dismissed.

X Jurisdictional Hearing date of March 14, 1986, III is set aside.

_ Off Calendar.

_ Case Dismissed.

_ _____

_____

_____

I hereby report my findings and order to the Presiding Judge of the Juvenile Court and certify that I have

caused a copy to be served on each parent or guardian of the minor as set forth in the Petition on file herein.

Dated February 26, 1986 Kristine Mackin McCarthy
KRISTINE MACKIN MCCARTHY
REFEREE OF THE JUVENILE COURT

Section 252 of the Welfare and Institutions Code reads as follows:

At any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee, a minor of his parent or guardian may apply to the juvenile court for a rehearing. Such application may be directed to all or to any specified part of the order or findings, and shall contain a statement of the reasons such rehearing is requested. If all of the proceedings before the referee have been taken down by an official reporter, the judge of the juvenile court may, after reading the transcript of such proceedings, grant or deny such application. If proceedings before the referee have not been taken down by an offical reporter, such application shall be granted as of right. If an application for rehearing is not granted within 20 days following the date of its receipt, it shall be deemed denied. However, the court, for good cause, may extend such period beyond 20 days, but not in any event beyond 45 days, following the date of receipt of the application, at which time the application for rehearing shall be deemed denied unless it is granted within such period.

FINDINGS AND ORDER OF REFEREE

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

In the Matter of the Guardianship of: N.J.H. AND A.E.H., Alleged Minors.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE OF JURISDICTION AND CONVENIENT FORUM Case No. 86 GN 34

The objection of C.C., appearing specially by his attorneys, James E. Welker and Peter B. Kelly, BRENNAN, STEIL, RYAN, BASTING & MacDOUGALL, S.C. to the Circuit Court of Rock County taking jurisdiction of the above child custody matter having come on for hearing before the Honorable John H. Lussow, Circuit Judge, Probate Branch, Rock County Circuit Court at the Courthouse in Janesville, Wisconsin on the 6th day of May, 3rd day of June, and 17th day of June, 1986, C.C. having appeared specially by said Attorney James E. Welker on the 6th day of May and 17th day of June, 1986 and by said Attorney Peter B. Kelly on the 6th day of June, 1986, the petitioners in the above entitled guardianship matter, P.C. and J.H. having appeared in person and by their Attorney Richard C. Kelly, MEALY & KELLY on each of said hearing dates, the above named minor children having appeared on each of the above hearing dates, and by their Guardian ad Litem, Attorney Daniel T. Dillon of Janesville, Wisconsin on the 17th day of June, 1986; and the Rock County Circuit Court having had on each of the beforementioned hearing dates a telephone conference with the Honorable Frank O. Tettley, Commissioner for the Superior Court of California, San Bernadino [sic] County, West District, Ontario, California, before whom

there appeared in said Superior Court in Ontario at each of said telephone conferences, C.C. and by his Attorney Beverly Jean Gassner, GASSNER & GASSNER of Ontario, California; and Attorney Elizabeth Goodley of GARRY, McTERNAN, STENDER, & WALSH of San Jose, California appeared specially for P.C. and J.H. and objected to the jurisdiction of the Superior Court of California for the County of San Bernadino over the paternity action commenced by C.C. on April 1, 1986, Superior Court Case No. OCV 38045, and the guardianship action commenced by C.C., Superior Court Case No. GW 865; and the above Circuit Court of Rock County, Wisconsin having reviewed the Affidavits and Briefs herein on file, having heard the arguments of counsel, having conferred orally by telephone conference with said Commissioner Frank O. Tettley, and having heard the arguments of California counsel, and being fully informed of the facts of this matter, now makes the following Findings of Fact, Conclusions of Law and Decree of Jurisdiction and Convenient Forum:

FINDINGS OF FACT

1. Both of the above named minor children, N.J.H. and A.E.H. were born in San Diego, San Diego County, California, out of wedlock to H.H. Said minor child N.J.H., hereinafter called N.J.H., was born on March 24, 1982. Said minor child A.E.H., hereinafter called A.E.H., was born on August 2, 1983. The children were fathered by different putative fathers. No paternity judgments concerning either of said minor children have ever been entered in any state.

2. H.H., the mother of the said minor children, hereinafter called H.H., was born in Whitehall, Wisconsin on February 27, 1962. H.H. was one of four children born to the marriage of J. and M.H. In 1963, the family moved to Green Bay, Wisconsin. The children of the family all attended school in Green Bay and graduated from high school in Green Bay. At the time that H.H. joined the Navy, she was a resident of Green Bay, Wisconsin. She entered the Navy on April 1, 1981 in Milwaukee, Wisconsin.

3. All of the [sic] H.H.'s sibblings [sic], except for T.T., who is in the military service living in Tuscon [sic], Arizona, reside in the State of Wisconsin. H.H.'s sister, J.H. lives with her husband, P.C., on a farm in the Town of Lima, Rock County, Wisconsin. Another sister of H.H., S.K., lives in Whitewater, Wisconsin, with her husband, J.K. S.K. and her husband have two children, B., age 4 years, and E., age 3 months old. H.H.'s brother, J.H., Jr., also lives in Green Bay, Wisconsin. H.H.'s mother, M.P.P., lives in Green Bay, Wisconsin. H.H.'s father, J.H., Sr., also lives in the Midwest, but in Macon, Missouri.

4. At the time of N.J.H.'s birth on March 24, 1982, H.H. was living in a two bedroom apartment at 200 Catalina Blvd., San Diego, California 92147, which she shared with another woman. The other woman was a member of the United States Navy and was being shipped to Hawaii. As H.H. could not, alone, afford the rent for that apartment, she, shortly after N.J.H.'s birth moved with N.J.H. to 3541 Kenora Drive, Apartment B6, Spring Valley, California 92077. In 1983, H.H. and N.J.H. moved to 3522 College Avenue, Apartment 6, San Diego, California 92115, where she and N.J.H. resided at the time

that A.E.H. was born on August 2, 1983. In April of 1983, H.H.'s two sisters, J.H. and S.K., and S.'s daughter, B., visited H.H. and N.J.H. in San Diego, California. S.K. and her daughter stayed one week, but J.H. stayed two weeks. During this visit, H.H. never informed either of the two said sisters that she was again pregnant; nor were they introduced to any boyfriends of H.H.

5. A.E.H. was born on August 2, 1983. On or about August 7, 1983, M.P.P., H.H.'s mother, traveled to San Diego to assist H.H. and her two children. Mrs. P. stayed approximately one month, during which period, she, H.H., and the two children visited the parents of C.C. C.C.'s parents lived in the San Diego area some distance from H.H.'s apartment. Mrs. P. was not familiar with San Diego and is not now familiar with the San Diego area. Mrs. P. did not know the address of C.C.'s parents at the time she visited their home and does not know it now. At the time that Mrs. P. visited C.C.'s parents, C.C. was not present. Mrs. P.'s visit to the home of C.C.'s parents lasted three to four hours. Sometime later in August of 1983, Mrs. P. met C.C. C.C. had come to visit H.H. at H.H.'s apartment. Mrs. P. was introduced to C.C. and was in his presence for approximately twenty minutes to one-half hour before Mrs. P. retired for the evening. Mrs. P. never saw or communicated with C.C. or his parents again. Mrs. P. would not recognize C.C. if she saw him again today. H.H. at the time had told Mrs. P. that she had no intention of marrying C.C., because she did not like the way C.C. treated N.J.H. H.H. said that C.C. had no affection for N.J.H. and did not enjoy N.J.H.'s company. Mrs. P. was not aware that C.C. or his parents had any continuing interest in A.E.H. after August of 1983. Mrs. P.

had no contact with either C.C. or his parents after August of 1983. Prior to the commencement of the above guardianship action, Mrs. P. never discussed with any of her other daughters or her sons-in-law the dinner she had with C.C.'s parents, or the brief meeting she had with C.C. On February 24, 1986, Mrs. P. would have had no recollection of C.C.'s last name or the last name of his parents or their addresses. If J.K. had asked her to identify the fathers of the two said minor children, she would not have been able to give him the last names of either putative father, nor would she have been able to give him any addresses of such fathers or their parents.

6. When the maternal grandmother, M.P.P., returned from California in early September of 1983, she brought N.J.H. with her. N.J.H. stayed in Green Bay for approximately one week to ten days. N.J.H. then stayed at the farm of his aunt and uncle, P.C. and J.H., in the Town of Lima, Rock County, Wisconsin for approximately one month. On April 14, 1983 the aunt, J.H., returned to California with her nephew, N.J.H. J.H., believing N.J.H. to be at an age when he needed the company of other children his own age, enrolled N.J.H. in a nursery school near his mother's base in California. Because H.H. was not able to afford the nursery school, J.H., during the period of November, 1983 through April, 1984 sent the sum of $220.00 per month to H.H. to cover the cost of the nursery school.

7. In December of 1983, H.H. and her two children moved to a larger apartment at 1455 Elder Avenue, Apartment A. Imperial Beach, California 92154. H.H. and the children shared the new apartment with H.H.'s boyfriend, a person by the name of Jeff (last name unknown).

In the Spring of 1984, H.H. was advised by the U. S. Navy that she would be stationed on the U.S.S. Ajax for one year; and that she would have to find other living arrangements for her children during that year. On May 1, 1984, H.H. and the two children flew to Kansas City, Missouri, where they were picked up by the maternal grandfather, J.H., Sr., and his wife, and driven to Macon, Missouri, where the maternal grandfather resided. H.H. stayed in Macon, Missouri with the children for two weeks before she reported to the U.S.S. Ajax. The children, N.J.H. and A.E.H., then resided with their maternal grandfather in Macon, Missouri for a full year.

8. Nine times during the course of that year, May 1, 1984 to May 1, 1985, the maternal grandfather and his wife traveled to Whitewater, Wisconsin to have the children visit with their two sets of aunts and uncles in Whitewater and their cousin, B. The maternal grandfather did this for the purpose of having the children become fully acquainted with the rest of the family. That summer, in fact, the maternal grandfather, his wife and children spent a ten day vacation in Wisconsin at the farm of the petitioners, P.C. and J.H. As a result, N.J.H. and A.E.H. were fully familiar with the farm surroundings when they returned to Wisconsin in February of 1986.

9. During the full year that the maternal grandfather had custody of N.J.H. and A.E.H. neither child received any contact from any person claiming to be the putative father or fathers or putative paternal grandparents of the children. The birthdays of both N.J.H. and A.E.H. passed without either child receiving any message or present from any alleged putative parent or putative paternal grandparent; and Christmas of 1984 passed

without either child receiving any messages or gifts from any alleged putative fathers or putative paternal grandparents.

10. On or about May 1, 1985, H.H. finished her tour on the U.S.S. Ajax and returned to Macon, Missouri, where she reacquainted herself with her children for approximately 2 weeks before returning with them to California.

11. Upon returning to California, H.H. and the children lived at 660 Tyrella Avenue, Apartment 36, Moutainview, California 94043. On or about October 1, 1985, H.H. and the children moved to 1593 Quebec Court, Apartment 6, Sunnyvale, California 94087.

12. H.H.'s family remained in frequent contact with N.J.H. and A.E.H. after the return to California in May of 1985. The maternal grandfather telephoned at least weekly and spoke with the children; and J.H. telephoned and spoke with the children on several occasions during the same period. Both maternal grandparents sent gifts to A.E.H. for her second birthday. Both maternal grandparents and J.H. and P.C. sent presents to the two children for Christmas, 1985.

13. J.H., petitioner, is thirty (30) years of age. She is married to P.C. Her educational background is as follows: she attended UW-Whitewater (Major in Special Education); Gateway Technical Institute, Kenosha (Associate Degree in Horticulture). The petitioner, P.C., is thirty-four (34) years of age. His educational background is as follows: He attended Western Illinois University (Animal Science). The petitioners, J.H. and P.C. have no children

of their own. They reside on a farm in the Town of Lima, Rock County, Wisconsin, farming approximately Two Hundred (200) acres and raising approximately Seventy (70) head of sheep. P.C.'s family also lives on County Line Road in the Town of Lima, Rock County, Wisconsin. The C. family has owned the farm in the Town of Lima for approximately Thirty-five (35) years.

14. In late 1985, or early 1986, H.H. and the two children moved to 100 North Whisman Road, Apartment 150, Mountainview, California 94043, where she and the children lived with H.H.'s then lover, J.B.

15. Throughout the years that H.H. was in the Navy, she had various and numerous lovers. Her involvement with men was promiscuous.

16. On February 23, 1986, H.H. was killed by a gunshot wound to the head at 100 North Whisman Road, Apartment 150, Mountainview, California. The children were taken into custody by the Juvenile Court of Santa Clara County, California and placed in separate foster homes in Santa Clara County. A murder investigation following her death was made by the civilian and military authorities in Santa Clara County.

17. On the morning on [sic] February 24, 1986, two U. S. Naval Officers visited the home of M.P.P., H.H.'s mother, and informed her of H.H.'s death. The news caused Mrs. P. to suffer a mental breakdown, as confirmed by the June 10, 1986 letter of her minister, the June 11, 1986 letter of Rolf F. Amundsen, M. Div., and the medical report of James Lacey, M.D., Beaumont Clinic, all of Green Bay, Wisconsin. Her mental condition was later diagnosed on May 13, 1986 by Koti Mannem, M. D.

Psychiatry as "Adjustment Disorder With Depressed Mood" (D.S.M. III # 309.00). Mrs. P. played no role in the return of the children to Wisconsin following H.H.'s death, except to initially pass on the information concerning the whereabouts of the children in California to her son-in-law, J.K., on February 24, 1986.

18. On February 24, 1986, J.K., the uncle of the two minor children, was advised by Mrs. P. of the phone numbers of Santa Clara County Police Officer James Warburton and Santa Clara County, California Social Worker Ed Hill. Mr. K. telephoned Mr. Ed Hill and was informed that a hearing concerning the children was to be held in Santa Clara County on Wednesday, February 26, 1986 at 9:30 a.m. On February 24th, Mr. K. in telephone conversations with Social Worker Hill, Officer Warburton, and Lt. Commander Mardula of the U. S. Navy, inquired of such persons whether they or anyone else had any information identifying the fathers of the two minor children. Nobody had any such information. H.H.'s siblings and their husbands had never been informed by H.H. or anyone else of C.C. specifically, or that anyone knew the identity of the putative fathers of the two minor children. In fact, H.H.'s siblings and their husbands had been advised by H.H. that she had not named any putative father on either of the birth certificates of the two minor children.

19. H.H.'s siblings and their husbands were ignorant of the fact that C.C. claimed to be the putative father of A.E.H. That C.C. was named as the father on the birth certificate of A.E.H., and that E.N. was named as the father of N.J.H. on N.J.H.'s birth certificate was not known by H.H.'s sibblings [sic] and their husbands until the following events occurred: First on March 14, 1986,

Lt. Commander Mardula at the U. S. Naval Base in Santa Clara County informed P.C. by telephone that a person named "C.C." was in his office claiming to be the father of A.E.H.; and Second, on March 19, 1986, pursuant to a telephone request made by P.C. of the Recorder of San Diego County, California, said Recorder mailed to P.C. certified copies of the birth certificates of both children.

20. On February 26, 1986, the Juvenile Court of the Superior Court of the State of California in and for the County of Santa Clara, in behalf of A.E.H., Petition No. 90565, and in behalf of N.J.H., Petition No. 90566, by the Honorable Kristine Mackin McCarthy, Referee of the Juvenile Court, released both children to their uncle, J.K., with the understanding that J.K. would be returning to Wisconsin with the children and that the State of Wisconsin would be taking jurisdiction of the two children. Appearing at said hearing on February 26, 1986 were J.K., and a Naval officer, in addition to District Attorney D. Soares. C.C. and E.N. did not receive notice of said hearing and did not appear. There was no conspiracy engaged in by the members of H.H.'s family to deny notice of the February 26, 1986 Juvenile Court hearing in Santa Clara County to C.C., E.N. or any other alleged putative father of either A.E.H. or N.J.H. The members of H.H.'s family could not have, with due diligence, given notice of the proceedings in Juvenile Court in Santa Clara County, California to C.C., E.N. or any other alleged putative father of the [sic] either A.E.H. or N.J.H. The proceedings in the Juvenile Court of Santa Clara County were emergency in nature because of the age of the children; the death of their mother, H.H., the sole known parent and

nuturer [sic] of the children; and the temporary placement of the children in separate foster homes, staffed by persons previously unknown to the children.

21. The military authorities, the United States Navy, also, formally released the children to J.K. by a Travel Order dated February 26, 1986 authorizing him to escort the two children back to Green Bay, Wisconsin on or before Febraury [sic] 28, 1986.

22. The United States Navy Record of Emergency Information prepared on February 22, 1985 by H.H., listing the names of persons to be contacted in the event of an emergency, does not list the name of C.C. or any other alleged putative father of the children.

23. On February 26, 1986, J.K. returned to Wisconsin with A.E.H. and N.J.H.

24. The Last Will and Testament of H.H. nominates the petitioners, P.C. and J.H. to be the guardians of her minor children.

25. Since February 26, 1986, both A.E.H. and N.J.H. have, for the past four months resided with their aunt and uncle, the petitioners, J.H. and P.C. The petitioners have provided for said children a healthy and happy home. The farm is an especially healthy environment for both A.E.H. and N.J.H. Both children have adjusted very well to life on the farm with their aunt and uncle in the Town of Lima, Rock County, Wisconsin and appear in fact to be thriving. Both children have been able to renew their acquaintance with their first cousin E.; and now both A.E.H. and N.J.H. have a very close, almost daily,

connection with their aunt and uncle, Mr. & Mrs. J.K., and B., age 4 and E., age 3 months.

26. Both A.E.H. and N.J.H. were diagnosed by a clinical child psychologist, Sandra Eisemann, Ph.D., shortly after their return to Wisconsin, as having special psychological needs. N.J.H. was diagnosed as having a speech and language disorder, and an Adjustment Reaction With Mixed Emotional Mood. A.E.H., also, was diagnosed as having an Adjustment Reaction With Mixed Emotional Mood. Both children continue to receive psychological counseling from Dr. Eisemann. N.J.H., for his speech problem, sees Lawrence J. Ketterman, Speech and Language Clinician of the Whitewater Unified School District, Whitewater, Wisconsin.

27. On March 17, 1986 J.H. and P.C. filed the Petition for Guardianship in the above entitled action, asking that letters of guardianship be issued to them as guardians of the persons and estates of N.J.H. and A.E.H. On March 17, 1986, the above court assumed jurisdiction over N.J.H. and A.E.H. and appointed the petitioners, P.C. and J.H., as temporary guardians of N.J.H. and A.E.H., and entered an order for hearing the petition for guardianship on May 6, 1986 at 11:00 a.m. On March 25, 1986, notice of the hearing for said petition for guardianship was served by mail upon Ms. T.T., Ms. S.K., E.N., C.C., M.P., J.H., Jr., as appears by the Affidavit of Mailing on file in the above entitled action, the June 3, 1986 Affidavit of C.C. admitting service, the April 18, 1986 brief of B. Jean Gassner, Attorney for C.C., acknowledging that C.C. was served by mail at his home, and the Certificate of Service of the United States Navy on E.N. on file in the above action. A copy of the said order for

hearing was also served personally upon J.H., Sr., as appears by the Certificate of Service on file herein. On April 7, 1986, Sandra Lang of the San Bernadino County, California Sheriff's Department was unable to personally serve said Order for Hearing on C.C. at the address of 1398 North 5th Avenue, Apartment 8, Upland, California for the reason that she was informed that said C.C. had not lived at said address for at least four (4) years, that he had moved and that no new address could be found. Said Certificate of the San Bernadino County Sheriff's Department is on file in the above action. The address at which said Sandra Lang attempted personal service on said C.C. was the same address that said C.C. had given to the military and police authorities on March 14, 1986, when he inquired at Santa Clara County of the whereabouts of A.E.H. On April 2, 9, 16, 1986, notice to unknown putative fathers of N.J.H. and A.E.H. of the Order for Hearing, Petition for Guardianship was published in the San Diego Daily Transcript, a newspaper of general circulation published in San Diego, San Diego County, California, as appears by the Certificate on file in the above action.

28. On April 1, 1986, C.C. filed in the Superior Court of the State of California for the County of San Bernardino, West District, Ontario, California, Case No. OCV 38045 seeking determination of the paternity of A.E.H.

29. On April 14, 1986, the Circuit Court of Rock County executed a notice under Section 6 UCCJA informing said Superior Court of California for San Bernadino County that the Circuit Court of Rock County, Wisconsin had assumed jurisdiction over said minor children,

appointed P.C. and J.H. as temporary guardians and entered an Order for Hearing Petition for Guardianship on May 6, 1986 at 11:00 a.m.; and advised said Superior Court to stay proceedings pending determination of the appropriate forum for the determination of the child custody issue. Said notice was then mailed to said Superior Court.

30. Subsequently, said C.C. commenced another action in the Superior Court of California for San Bernardino County, West District, Ontario, California for guardianship of the person of N.J.H., Case No. GW 865. The original petition for guardianship filed in Case No. GW 865, listed the putative father of N.J.H. as unknown, although E.N. is named as the father on the birth certificate on file in San Diego County, California.

31. Neither N.J.H. nor A.E.H. have ever resided in San Bernadino County, California.

32. C.C. is named on A.E.H.'s birth certificate as the putative father. C.C., however, has never resided with A.E.H. or exercised any control or custody over A.E.H. C.C. has never contributed in any material way to the support of A.E.H. C.C. does not claim to be the putative father of N.J.H. During A.E.H.'s life, C.C., has, at best, been only an occasional visitor of A.E.H. C.C.'s Section 9 UCCJA Declaration of past addresses where A.E.H. has lived in the past 5 years shows an incomplete knowledge of where A.E.H. has lived. Said Declaration was part of C.C.'s original papers filed in Case OCV 38045 in San Bernardino County. During the two and one-half year period of A.E.H.'s life before the death of A.E.H.'s mother, C.C. never commenced a paternity action to

establish any claim of legal rights to A.E.H. During the period of time that A.E.H. and N.J.H. lived with the maternal grandfather in Macon, Missouri from May, 1984 through May, 1985, C.C. never attempted to make contact with said children, nor did he during that period remember A.E.H.'s birthday or Christmas. C.C. never made known his claim of paternity to the United States Naval authorities; nor did he ever request of such U. S. Naval authorities notice in the event of an emergency concerning A.E.H. or N.J.H. C.C. does not have an intimate relationship with either A.E.H. or N.J.H. After N.J.H. and A.E.H. returned in May of 1985 to Santa Clara County, California, C.C. continued to live more than 400 miles away in San Bernadino County, California. It was not generally known in the Santa Clara County area that C.C. claimed to be the father of A.E.H. A Murder investigation was undertaken concerning the death of H.H. and the Police and Military authorities never discovered C.C.'s existence until C.C. inquired about the death himself more than 2-1/2 weeks later.

33. E.N. has never been adjudged to be the father of N.J.H. E.N. has never commenced a paternity action to establish his legal rights to N.J.H. E.N. has never contributed to the support of N.J.H. E.N. has never visited or established a relationship with N.J.H.

CONCLUSIONS OF LAW

1. Notice and opportunity to be heard was given under Sec. 822.04, .05, Wisconsin Statutes, Sections 4 and 5 UCCJ [sic] in a manner reasonably calculated to give

actual notice to all persons entitled to be heard including Mrs. M.P.P., 1331 Belleuve [sic] Lohist Street, Lot 510, Green Bay, Wisconsin 54302, Mrs. T.T., 10582 East Keystone Road, Tuscon [sic], Arizona 85730, Mrs. S.K., 239 Jefferson Street, Whitewater, Wisconsin 53190, C.C., 1378 North 5th, #8, Upland, California 91786, J.H., Sr., 1020 Valleyview Court, Macon, Missouri 63552, J.H., Jr., 1331 Belleuve [sic] Lohist Street, Lot 510, Green Bay, Wisconsin 54302, and E.N., MM1, Trident Refit Facility Bangor, Bremerton, Washington 98315-5300, as appears by the Proofs of Service on file herein; and the court has jurisdiction over such persons for the purpose of making a decree of jurisdiction and convenient forum under the Uniform Child Custody Jurisdiction Act.

2. The Probate Branch of the Rock County, Wisconsin Circuit Court is competent under Sec. 880.02, Wisconsin Statutes to decide the custody of the above minor children under the petition in the above action, and has jurisdiction under Sec. 822.03(1)(b) (c) and (d) of the Wisconsin Statutes, Section 3(a) (2) (3) and (4) UCCJA to make the child custody determination of both of the above named minor children by initial decree, for the following reasons:

a. Under Section 822.03 (1)(b), Wisconsin Statutes, Section 3 (a) (2) UCCJA it is in the best interest of the child that a court of the State of Wisconsin assume jurisdiction because both children and the contestants, P.C. and J.H., have significant connections with the State of Wisconsin.

The petitioners, P.C. and J.H., both are contestants. They are residents of Rock County, taxpayers and farmers in the Town of Lima, Rock County, Wisconsin.

The said minor children have significant connections with the State of Wisconsin for the following reasons: their mother, H.H., was born, raised and educated in the State of Wisconsin. The mother is now buried in Wisconsin. The mother, as a Seaman in the United States Navy, and said minor children were living in California, not necessarily by choice, but because the mother was stationed in California by the Navy. Her length of stay in California depended not on her intent to establish residency, but on the duty assignment given to her by the Navy. Evidence of the lack of permanency of residency is the year of residency of the minor children in the State of Missouri, a Midwestern state, from May, 1984 to May, 1985, the period when the mother was assigned to on-ship duty with the U.S.S. Ajax.

All of the minor children's aunts and uncles reside in Wisconsin, except for T.T. and her husband, who live in Tuscon [sic], Arizona (Mrs. T. is also in the military service). Said minor children have, in addition to the petitioners, another aunt and uncle, Mr. & Mrs. J.K., who live in Whitewater, Wisconsin. The minor children have two young cousins who also live in Whitewater, Wisconsin. The maternal grandmother lives in Green Bay, Wisconsin, and the maternal grandfather lives in the Midwest in Macon, Missouri.

Both children have lived for a substantial part of their life in the Midwest and Wisconsin. A.E.H. has spent almost one-half of her life in the Midwest. Both of said minor children were previously familiar with the home and farm of the petitioners in the Town of Lima, Rock County. Both of said minor children now having spent the last three and one-half months living on said farm

identify it as their home. For each of said minor children, the only known legal relative from their immediate family now resides in Wisconsin (for A.E.H. her only known relative from her immediate family is N.J.H., and vice versa). Both said minor children enjoy a close kinship and friendship with their first cousins, B., age 4, and E., age 3 months, in Whitewater, Wisconsin.

b. Under Section 822.03 (1)(b), Section 3 (a)(2) UCCJA, it is in the best interest of both children that a court of the State of Wisconsin assume jurisdiction because there is available in this state substantial evidence concerning the present and future care, protection, training, and personal relationships of said minor children, to wit: said minor children have resided continuously on the petitioners' farm in the Town of Lima, Rock County, Wisconsin since February 26, 1986; both children have been diagnosed to have special psychological problems following the tragic death of their mother on February 23, 1986. Both children have been diagnosed as having a "Adjustment Reaction With Mixed Emotional Mood". Both children have received and continue to receive psychological counseling from Sandra Eisemann, Ph.D. of Fort Atkinson and Madison, Wisconsin. N.J.H., in addition has a speech problem, which was diagnosed by Lawrence J. Ketterman, Speech and Language Clinician of the Whitewater Unified School District, and has received and continues to receive counseling from Mr. Ketterman concerning such speech problem. Both minor children have enjoyed and continue to enjoy a close friendship and relationship with their aunts, uncles, and first cousins in the Whitewater, Wisconsin area.

There has been adduced little or no evidence concerning persons in the community in Santa Clara County, California, where the children were living at the time of their mother's death, who might provide protection, training or personal relationships for said minor children. Said C.C. lives in San Bernadino County, California, some 400 miles distant from Santa Clara County, California. C.C. has never been adjudged to be the father of either minor child. C.C. claims not to be the father of N.J.H. C.C. was never married to H.H., the mother of the minor children. C.C. never resided with either the said mother or said minor children. C.C. never had custody of either of said minor children. C.C. has never contributed in any substantial way to the support of either of said minor children. C.C. was only an occasional visitor to A.E.H.

c. Under Section 822.03(1)(c), Wisconsin Statutes Section 3(a)(3) UCCJA, both children are physically present in the State of Wisconsin, and both children were abandoned in the State of California by the death of their mother, H.H., on February 23, 1986; said H.H. being their sole custodian and nurturer. At the time of the death of H.H., the United States Navy, and the civilian authorities in Santa Clara County, California knew of no persons other than the deceased mother's relatives in the Midwest to contact concerning the children. C.C. had never made known to either the United States Navy or the civilian authorities in Santa Clara County, California, his claim of paternity to A.E.H., and his wish to be notified in the event of an emergency concerning either her or N.J.H.

d. Under 822.03(1)(c), Wisconsin Statutes, Section 3(a)(3) UCCJA, both minor children are physically in

Wisconsin and were returned here under emergency cicumstances [sic], and it is necessary because of such emergency circumstances to protect both children, because both children are otherwise neglected and dependent to wit: both children having been living in Wisconsin since February 26, 1986; their only known living parent, their mother, is dead; prior to the mother's death, she was the only custodian and nuturer [sic] of said minor children; there is no known adjudicated living parent of either said minor children; and both children, because of their ages, N.J.H., age 4, and A.E.H., age 2, would, unless the State of Wisconsin takes jurisdiction, be in neglected, dependent and necessitious [sic] circumstances.

e. The Probate Branch of Rock County, Wisconsin Circuit Court, further, has jurisdiction to make a child custody determination concerning said minor children, under Section 822.03(1)(d), Wisconsin Statutes, Section 3(a)(4) UCCJA, because the Superior Court of California for the County of Santa Clara, declined to exercise jurisdiction over said minor children, releasing said minor children after a hearing on February 26, 1986, to their uncle J.K. of Whitewater, Wisconsin for return to the State of Wisconsin, with the understanding that the State of Wisconsin would assume jurisdiction over the children; and for the reason that it is in the best interest of the minor children that the Circuit Court of Rock County, Wisconsin assume jurisdiction for the reasons stated above, and the reason that said minor children have adjusted very well to their new home on the farm in the Town of Lima, Rock County, Wisconsin, and in fact are thriving in the rural environment of their Lima Township home.

3. Under Section 822.06, Wisconsin Statutes, Section 6 UCCJA, the Probate Branch of the Circuit Court of Rock County, Wisconsin is the appropriate forum to exercise jurisdiction and make the child custody determination with respect to the said minor children, and inappropriate for the West District of Superior Court of California for the County of Bernadino to assume jurisdiction and make such child custody determination for the following reasons:

a. The above Petition for Guardianship of said minor children was filed in Rock County, Wisconsin on March 17, 1986, two weeks before C.C. filed an action for the determination of paternity of A.E.H., and more than two weeks before C.C. filed an action for guardianship of N.J.H., in the West District of the Superior Court of California for San Bernadino County;

b. At the time said actions were commenced in San Bernardino County, California, the Probate Branch of the Rock County, Wisconsin Circuit Court for the reasons stated above, was exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act, having on March 17, 1986 appointed P.C. and J.H., the petitioners, temporary guardians of the persons and estates of said minor children; and

c. The State of Wisconsin, and more specifically, the Probate Branch of the Rock County Circuit Court, is a more appropriate forum than the West District Superior Court of California for San Bernadino County for the following reasons: both minor children have now resided in Wisconsin continuously for the last three and one-half months; the children have adjusted very well to life on

the Lima Township, Rock County, Wisconsin farm, have a very close, loving and stable relationship with their aunt and uncle, P.C. and J.H.; the minor children, in fact, are thriving with the life on the farm; the children have need of professional psychological assistance, and their aunt and uncle have obtained the same for the children; almost all of the family relationships of the minor children are in the State of Wisconsin; C.C. has never been adjudicated to be the father of either of said children and claims to be father of only A.E.H.; C.C. has been only an occasional visitor of A.E.H.; to again uproot the said children and transport them approximately two thousand miles to a completely strange environment (San Bernadino County being some four hundred miles from Santa Clara County, their former home) would expose them to unknown psychological trauma; and substantial evidence concerning the present and future care, protection, training and personal relationships of both of said children as stated above, is more readily available in the State of Wisconsin.

4. The Probate Branch of Rock County Circuit Court, Wisconsin should not decline jurisdiction by reason of conduct under Section 822.08, Wisconsin Statutes, Section 8 UCCJA, for the following reasons:

a. Both children were released to their uncle J.K. by both the Juvenile Court of the Superior Court of California for Santa Clara County and the United States Navy on February 26, 1986, after a hearing in the said Juvenile Court, for return to Wisconsin by their uncle J.K. with the understanding that the State of Wisconsin would take jurisdiction over said children.

b. C.C. never received notice of the hearing on February 26, 1986 in the Juvenile Court of the Superior Court of California for Santa Clara County because of his own fault in having failed for more than two and one-half years to:

> 1. Contribute, in any material way to the support of A.E.H., his claimed child;
>
> 2. Commence a paternity action to establish legal parental rights to A.E.H.;
>
> 3. Make his claim of paternity over A.E.H. known to the military authorities and known generally in the community where A.E.H. was residing at the time of her Mother's death; or
>
> 4. Attempt to make contact with the said minor children during the period of May, 1984 through May, 1985, when the children were living with the maternal relatives in the Midwest; and when he could have made generally known to all of the maternal relatives, not merely the paternal grandmother, his claim of paternity of A.E.H.

c. C.C. was not denied due process of law when he did not receive notice and an opportunity to be heard before the Juvenile Court of the Superior Court in Santa Clara County on February 26, 1986, because he has failed to show the [sic] his interest in A.E.H. had acquired substantial protection under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, to wit: C.C.'s affidavits do not show that he had made a full committment [sic] to A.E.H. His affidavits fail to show the type of emotional attachment to either of said children that derives from the intimacy of

daily association, and from the role it plays in promoting a way of life through the instruction of said children. Instead, his affidavits show him to be only an occasional visitor, who for more than one year from May, 1984 to May, 1985 attempted to make no contact with either of said children. C.C. made no full committment [sic] to the responsibilities of parenthood. He never contributed in any substantial manner to the support or rearing of either of said children.

d. C.C. could not have been served with notice of said Juvenile hearing before the Superior Court in Santa Clara County, which hearing was emergency in nature and time was of the essence, even if C.C.'s claim of paternity had been known to the participants at said hearing, because the Sheriff's Department of San Bernadino County, California, on April 7, 1986, when attempting to service said C.C. with process, at an address which said C.C. has given as his home address to Lt. Commander Mardula at the United States Naval Base in Santa Clara County on March 14, 1986; said Sheriff's Department being advised he had not lived there for 4 years and his whereabouts were unknown; and because the whereabouts of C.C. could not have been ascertained with due diligence on short notice; and because publication of notice would not have been practicable.

e. The maternal relatives of said minor children did not engage in any conspiracy to deny C.C. notice and an opportunity to be heard before the Juvenile Court of the Superior Court in Santa Clara County. The maternal relatives who participated in the return of the children to Wisconsin were totally ignorant of the existence of C.C.

The only maternal relative who was aware of the existence of C.C. was the maternal grandmother, Mrs. M.P.P., who did not participate in the return of the children to Wisconsin, other than to give the information concerning their whereabouts to their uncle J.K. M.P.P., the maternal grandmother suffered a mental breakdown upon learning of the tragic death of her daughter, H.H., and was not capable of participating in any conspiracy, and did not participate in any conspiracy to deny C.C. any rights which he might have with respect to said minor children.

e. [sic] The conduct of the maternal relatives in acting with dispatch to assist the said minor children in California was not reprehensible. Instead, the dispatch with which they acted showed their love and concern for the children at a time of great crisis for the children. The maternal relatives are to be commended, not condemned for the manner in which they took care of the children in California and subsequently in Wisconsin following the death of the mother.

DECREE

Upon the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Probate Branch of the Rock County, Wisconsin Circuit Court has and does hereby take jurisdiction to make the child custody determination concerning said minor children in the above entitled action, and

2. That the actions commenced by C.C., pending in the West District, Superior Court of California in and for

San Bernadino County, entitled C.C., Plaintiff vs. Estate of H.H., et al., Case No. OCV 38045, and Guardianship of the Person of N.J.H., Case No. GW 865, be and the same is are [sic] hereby stayed; and the West District, Superior Court of California in San Bernadino County be and it hereby is directed to cease taking any further action in said cases.

Dated at Janesville, Wisconsin this

3rd day of July, 1986.

Nun [sic] Pro Tunc June 17, 1986

BY THE COURT:

/s/ John H. Lussow
Honorable John H. Lussow,
Circuit Judge

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,
Case No. 86-TR-71, on May 14, 1987, page 91.
Direct by Attorney Welker of C.C.

* * *

BY MR. WELKER:

Q During that, um, um, period of time after H.H. became pregnant, did your living circumstances change?

A Yes, I moved to Texas.

Q And why was that?

A I got – I was discharged from the Navy and – in February, and I moved to Dallas to start a new job.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,
Case No. 86-TR-71, on May 14, 1987, page 113.
Direct by Attorney Welker of C.C.

* * *

Q Now, at some point along the way you were married, were you not?

A Yes, I was.

Q And when was that approximately?

* * *

A February of '84.

BY MR. WELKER:

Q All right. In February of 1984, you were married. What was your wife's name?

* * *

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,
Case No. 86-TR-71, on May 14, 1987, page 138.
Direct by Attorney Welker of C.C.

Q Now, as a result of those inquiries, what did you find out concerning the whereabouts of your children?

A That they were in Wisconsin.

* * *

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,
Case No. 86-TR-71, on May 16, 1987, page 16.
Cross-Examination by Attorney Kelly of C.C.

* * *

Q No. Excuse me. It's your – it's your testimony that on one occasion H.H. did ask for support?

A Yes, one time.

Q And you turned her down saying that, um, you had new family obligations?

A I was just married, and my wife was in the room and we were having problems, yes.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS,
Case No. 86-TR-71, on May 16, 1987, page 161.
Attorney Dillon's closing argument.

* * *

Mr. C.C. had reason to believe H.H. was afraid of Mr. B. He had reason to believe that those children were in a dangerous situation living there with Mr. B. There would have been a lot of things he could have done. He could have sought some sort of protective order. He could have talked to her. He could have helped her out financially. Nothing. He had a golden opportunity to take care of A.E.H. when mom went out to sea for a year. What did he do? Nothing. He knew she was leaving. Mr. C.C., I think it could be said of him, has done what he felt like doing with respect to these children, particularly A.E.H., and in a fashion that I think is unbecoming to Mr. C.C., he blames other people for what he has failed to do. Grandpa H. didn't give him an address; and therefore, it was Grandpa H.'s fault, Opa (Phon.) that he didn't talk to, didn't have any contact at all with A.E.H. for 14 months, that was Grandpa's fault.

* * *

MR. DILLON: His wife was jealous. So during that period of time when he had very little to do with this child, it was her fault. And H.H. herself, it was her fault because H.H. was too proud to accept money from him.

* * *